DOCKET

No. 13-983

Title:	Anthony Douglas Elonis, Petitioner
	v.
	United States
Docketed:	February 19, 2014
Linked with 13A695	
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Nos.:	(12-3798)
Decision Date:	September 19, 2013
Rehearing Denied:	October 17, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 20 2013	Application (13A695) to extend the time to file a petition for a writ of certiorari from January 15, 2014 to March 7, 2014, submitted to Justice Alito.
Jan 6 2014	Application (13A695) granted by Justice Alito extending the time to file until February 14, 2014.
Feb 14 2014	Petition for a writ of certiorari filed. (Response due March 21, 2014)
Mar 12 2014	Order extending time to file response to petition to and including April 21, 2014.
Mar 21 2014	Brief amici curiae of Thomas Jefferson Center for the Protection of Free Expression, et al. filed.
Apr 21 2014	Brief of respondent United States in opposition filed.
May 5 2014	Reply of petitioner Anthony Douglas Elonis filed.
May 6 2014	DISTRIBUTED for Conference of May 22, 2014.
May 27 2014	DISTRIBUTED for Conference of May 29, 2014.
Jun 2 2014	DISTRIBUTED for Conference of June 5, 2014.
Jun 9 2014	DISTRIBUTED for Conference of June 12, 2014.
Jun 16 2014	Petition GRANTED In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U. S. C. 875(c) requires proof of the defendant's subjective intent to threaten."
Jul 7 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 15, 2014.
Jul 7 2014	The time to file respondent's brief on the merits is extended to and including September 29, 2014.
Jul 8 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.

Jul 30 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 15 2014	Joint appendix (2 volumes) filed. (Statement of costs filed.)
Aug 15 2014	Brief of petitioner Anthony Douglas Elonis filed.
Aug 18 2014	Brief amici curiae of Marion B. Brechner First Amendment Project, et al. filed.
Aug 22 2014	Brief amici curiae of People for Ethical Treatment of Animals, Inc. (PETA). et al. filed.
Aug 22 2014	Brief amicus curiae of Center for Individual Rights filed.
Aug 22 2014	Brief amici curiae of Student Press Law Center. et al. filed.
Aug 22 2014	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
Aug 22 2014	Brief amici curiae of American Civil Liberties Union, et al. filed.
Aug 22 2014	Brief amici curiae of Rutherford Institute, et al. filed.
Aug 22 2014	Brief amici curiae of Thomas Jefferson Center for the Protection of Free Expression. et al. filed.
Sep 4 2014	SET FOR ARGUMENT on Monday, December 1, 2014.
Sep 22 2014	Brief amicus curiae of National Center for Victims of Crime filed.
Sep 22 2014	Record requested from U.S.C.A. 3rd Circuit.
Sep 29 2014	Brief of respondent United States filed.
Oct 2 2014	Brief amici curiae of Wisconsin, et al. filed. (Distributed)
Oct 6 2014	Brief amici curiae of National Network to End Domestic Violence, et al. filed.
Oct 6 2014	Brief amicus curiae of Anti-Defamation League filed.
Oct 6 2014	Brief amici curiae of Domestic Violence Legal Empowerment and Appeals Project, et al. filed.
Oct 6 2014	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Oct 27 2014	CIRCULATED.
Oct 29 2014	Reply of petitioner Anthony Douglas Elonis filed. (Distributed)
Nov 3 2014	Record received from U.S.C.A. 3rd Circuit. The record is electronic.
Dec 1 2014	Argued. For petitioner: John P. Elwood, Washington, D.C. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

13-983

No.

In the Supreme Court of the United States

ANTHONY D. ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr, 13th Fl.
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

QUESTION PRESENTED

It is a federal crime to "transmit[] in interstate or foreign commerce any communication containing * * * any threat to injure the person of another," 18 U.S.C. § 875(c). Numerous states have adopted analogous crimes. The question presented is:

Whether, consistent with the First Amendment and *Virginia* v. *Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

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State v. *Soboroff*, 798 N.W.2d 1 (Iowa 2011) 18

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Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225 (2006) 2, 3, 4

Adam Edelman & Joseph Straw, *New York Rep. Michael Grimm threatens reporter after being asked about fundraising allegations*, N.Y. Daily News, Jan. 23, 2014, http://goo.gl/XW6sys 32

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Kyle A. Mabe, Note, *Long Live the King:* United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 Golden Gate U. L. Rev. 51 (2013) 34

Other Authorities—Continued: **Page(s)**

Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. Rev. 43 (2011) 34-35

John Noel, *NY School District Shut Down Over Facebook Misunderstanding*, NBC 4 New York, Mar. 1, 2010, http://goo.gl/F1ac0i 34

Bianca Prieto, *Polk County Man's Rap Song Called Threat to Cops, So He's in Jail for 2 Years*, Orlando Sentinel, Aug. 1, 2009, http://goo.gl/WRGOQ3.....35

Recent Case, *United States* v. *Jeffries*, 126 Harv. L. Rev. 1138 (2012).....30

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-29a, is reported at 730 F.3d 321. The opinion of the district court denying petitioner's post-trial motions, App., *infra*, 30a-48a, is reported at 897 F. Supp. 2d 335. The opinion of the district court denying petitioner's motion to dismiss, App., *infra*, 49a-60a, is unreported, but available at 2011 WL 5024284.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2013, and a timely petition for panel rehearing and rehearing en banc was denied on October 17, 2013. On January 6, 2014, Justice Alito extended the time for filing a petition for a writ of certiorari to February 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 875(c) of Title 18 of the United States Code provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

This case concerns an important First Amendment question that is the subject of an acknowledged conflict among federal courts of appeals and state

courts of last resort: whether a person can be convicted of the felony "speech crime" of making a threat only if he subjectively intended to threaten another person, or whether instead he can be convicted if he negligently misjudges how his words will be construed and a "reasonable person" would deem them a threat. Petitioner was convicted of violating 18 U.S.C. § 875(c), which makes it a crime to transmit in interstate commerce "any communication containing * * * any threat to injure the person of another." At trial, the district court rejected petitioner's request for a "subjective intent" instruction and told the jury that it is irrelevant whether a speaker charged with violating Section 875(c) actually intended to threaten anyone. Instead, the court instructed the jury that it was enough that "a reasonable person would foresee that the statement" would be interpreted as a threat. C.A. App. 547.

While the First Amendment does not protect "true threats," *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam), the scope of that category of unprotected speech is the subject of widespread confusion. In the absence of guidance from this Court, Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001) ("The Supreme Court's minimal guidance has left each circuit to fashion its own test."), most lower courts adopted an "objective" standard, looking to whether a reasonable person would understand a statement to be a threat, see Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1243-1244 (2006). In *Virginia* v. *Black*, 538 U.S. 343 (2003), this Court "[f]or the first time * * *

defined the term 'true threat,'" Crane, 92 Va. L. Rev. at 1226, holding that the term applies to "those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708) (emphasis added).

The lower courts are sharply divided about the implications of *Black*. The Ninth Circuit and several state supreme courts hold that the objective standard cannot be reconciled with this Court's jurisprudence, and accordingly "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech." *United States* v. *Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); accord *O'Brien* v. *Borowski*, 961 N.E.2d 547, 557 (Mass. 2012); *State* v. *Miles*, 15 A.3d 596, 599 (Vt. 2011); *State* v. *Grayhurst*, 852 A.2d 491, 515 (R.I. 2004); see also *State* v. *Pomianek*, 58 A.3d 1205, 1217 (N.J. Super Ct. App. Div. 2013) (stating that construing state bias-intimidation statute not to require "proof of intent with respect to each element of the offense" "would cause the statute to run afoul of the First Amendment principles espoused in *Black*"). The Tenth Circuit has likewise recognized in *dicta* that true threats "[u]nprotected by the Constitution[,] * * * must be made 'with the intent of placing the victim in fear of bodily harm or death.'" *United States* v. *Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting *Black*, 538 U.S. at 360). And the Seventh Circuit has written that "an entirely objective definition [of 'true threat']" may "no longer [be] tenable" after *Black*. *United States* v. *Parr*, 545 F.3d

491, 500 (7th Cir. 2008). But other courts, like the court of appeals below, consider themselves constrained to follow pre-*Black* authority. "[A]bsent a clearer statement from the Court, the circuit courts will not change the firmly established precedent of their true threat jurisprudence." Crane, 92 Va. L. Rev. at 1264.

The Third Circuit's decision should not stand. It contributes to a recognized conflict among the courts of appeals and state courts of last resort on whether a subjective intent to threaten is constitutionally required before a person can be convicted of making a threat. Indeed, in *eight* states there is conflict between decisions of the state's high court and the regional federal circuit on that very question, subjecting speakers to uncertainty about the legal standard that applies to their statements. Moreover, the decision below cannot be reconciled with this Court's decision in *Black*. Permitting conviction based on negligence for a crime of pure speech is contrary to basic First Amendment principles. This issue implicates hundreds of convictions under federal law and threat statutes enacted by numerous states. Further review is warranted.

A. Factual Background

This case arises out of posts petitioner made during 2010 on the social media website Facebook. At the time, petitioner was 27 years old; his wife of nearly seven years had left him, taking their two children with her. Petitioner's supervisor at Dorney Park & Wildwater Kingdom, an amusement park in Allentown, Pennsylvania, observed him "with his head down on his desk crying, and he was sent home

on several occasions because he was too upset to work." App., *infra*, 3a. Soon afterwards, petitioner lost his job. Petitioner made a series of posts about his situation, frequently in the form of rap lyrics, using "crude, spontaneous and emotional language expressing frustration." *Id.* at 55a. Although the language was—as with popular rap songs addressing the same themes[1]—sometimes violent, petitioner posted explicit disclaimers in his profile explaining that his posts were "fictitious lyrics," C.A. App. 412, and he was "only exercising [his] constitutional right to freedom of speech." *Id.* at 112. Petitioner explained about his posts, "for me, this is therapeutic. It help[ed] me to deal with the pain." *Id.* at 394.

1. Facebook provides its users with a home page on which the user can post comments, photos, and links to other websites. Facebook users may become "friends" with other users; after a member requests to be "friends" with another user, the requested friend

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[1] At trial, petitioner testified that he was influenced by the rap artist Eminem's songs *Guilty Conscience*, *Kill You*, *Criminal*, and *97 Bonnie and Clyde* as influences. C.A. App. 424. Eminem repeatedly fantasized in songs about killing his ex-wife. *E.g.*, Eminem, *Kill You*, *on* The Marshall Mathers LP (Interscope Records 2000) ("Slut, you think I won't choke no whore/Til the vocal cords don't work in her throat no more?" "Put your hands down bitch, I ain't gonna shoot you/I'ma pull you to this bullet, and put it through you."); Eminem, *97 Bonnie and Clyde*, *on* The Slim Shady LP (Interscope Records 1999) ("Da-da made a nice bed for mommy at the bottom of the lake/Here, you wanna help da-da tie a rope around this rock? (Yeah!) We'll tie it to her footsie, then we'll roll her off the dock." "There goes mama, spwashin' in the wa-ta/No more fightin' wit dad, no more restraining order/No more step-da-da, no more new brother/Blow her kisses bye-bye, tell mama you love her.").

receives an email in which they can elect to accept or reject the friend request. See generally E.A. Vander Veer, *Facebook: The Missing Manual* (2008), *available at* http://goo.gl/UFlK3l. Depending on the user's privacy settings, a Facebook user's home page may be visible only to that user's "friends," or it may be viewable by any Facebook member. A user may also restrict the ability of someone who is not a "friend" to find that user's profile without knowing the user's unique identification number or username.

Posts that a member makes on his or her own Facebook page may automatically appear in their friends' "news feed," a listing of recent postings. In addition, when a member posts a comment on his or her own Facebook page, he or she has the option of "tagging" other Facebook users (including users who are not friends); doing so makes the "tagged" post appear on the "tagged" member's own Facebook page. Unless two users are friends, have a friend in common, or one user has "tagged" the other user, a Facebook member must affirmatively visit the other user's page to view posts written on that Facebook page. See generally *Thompson* v. *Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928, at *4 n.4 (D. Nev. June 30, 2012).

2. Petitioner had a "public" Facebook profile, meaning that his page was viewable by any member of the public who used appropriate search terms to locate the page, C.A. App. 182, which was listed not in his actual name but under the pseudonym "Tone Dougie," a play on his first and middle names.

Shortly before Halloween in October 2010, petitioner posted on his Facebook page a photograph

of petitioner and a co-worker performing in costume for Dorney Park's 2009 "Halloween Haunt" (a seasonal haunted-house-themed event). App., *infra*, 3a. The photograph showed petitioner in costume holding a toy knife against a co-worker's neck.[2] *Ibid.* Petitioner captioned the photo, "I wish." *Ibid.* There is no evidence that petitioner "tagged" the co-worker, and they were not "friends." C.A. App. 315. Petitioner later explained that he enjoyed performing and "wish[ed]" he had been able to perform in Halloween Haunt again. See *id.* at 435, 444. However, petitioner's supervisor saw the post, interpreted it as a threat, and fired him. App., *infra*, 3a.

Two days after he was fired, petitioner posted a Halloween-themed comment reflecting his belief that his former coworkers were preoccupied with him, and what petitioner believed they were saying about him:

> Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility for a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

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[2] Although the government introduced evidence at trial that the co-worker had made sexual harassment complaints about petitioner, there is no dispute that petitioner was unaware of her complaints at the time. C.A. App. 444.

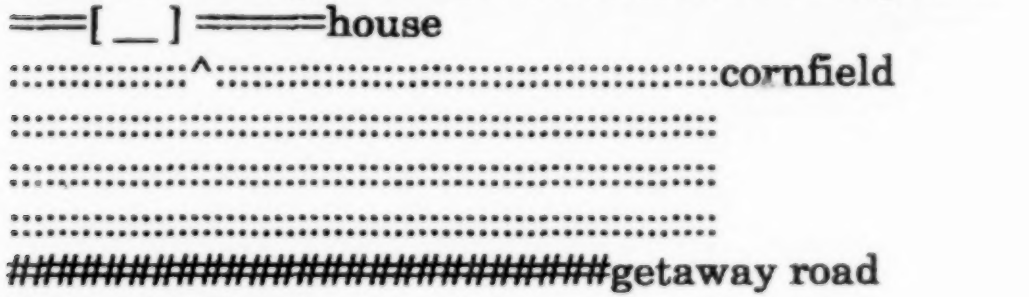
App., *infra*, 3a-4a. The government introduced no evidence that petitioner "tagged" any former co-worker on that post.

In October 2010, petitioner's sister-in-law posted a Facebook status update that she was shopping for Halloween costumes with petitioner's children. App., *infra*, 4a. Petitioner responded that his son "should dress up as matricide for Halloween," adding, "I don't know what his costume would entail though. Maybe [petitioner's wife's] head on a stick?" *Ibid.* Petitioner ended the post with an "emoticon" of a face sticking its tongue out, which he understood to be an indication a post is meant in "jest." C.A. App. 299, 410-411.

In November 2010, petitioner's wife obtained a Protection from Abuse ("PFA") order against petitioner. App., *infra*, 5a. Petitioner then posted on his Facebook page a virtually word-for-word adaptation of a satirical sketch by the "Whitest Kids U' Know" comedy troupe that he and his ex-wife had previously watched together, C.A. App. 269-270; in that sketch, a member of the troupe explains that it is illegal for a person to say that he wishes to kill the President, but not illegal to explain that it is illegal to say that one wants to kill the President. Petitioner's post read:

> Did you know that it's illegal for me to say I want to kill my wife?
> It's illegal.
> It's indirect criminal contempt.
> It's one of the only sentences that I'm not allowed to say.
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.

I'm not actually saying it.
I'm just letting you know that it's illegal for me to say that.
It's kind of like a public service.
I'm letting you know so that you don't accidently go out and say something like that
Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.
That's illegal.
Very, very illegal.
But not illegal to say with a mortar launcher.
Because that's its own sentence.
It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.
Perfectly legal.
I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.
Insanely illegal.
Ridiculously, wrecklessly, insanely illegal. Yet even more illegal to show an illustrated diagram.



Insanely illegal.
Ridiculously, horribly felonious.

> Cause they will come to my house in the middle of the night and they will lock me up.
> Extremely against the law.
> Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

App., *infra*, 5a-6a. Petitioner included a link to the original video. See Whitest Kids U' Know, *It's Illegal to Say . . .*, https://www.youtube.com/watch?v=QEQOvyGbBtY; see also App., *infra*, 63a-64a (transcript). Petitioner ended the post with the statement, "Art is about pushing limits. I'm willing to go to jail for my constitutional rights. Are you?" C.A. App. 398. Petitioner was not Facebook friends with his wife and there is no indication he tagged her in that (or any other) post.

In another post he made in November 2010, petitioner mocked his wife's PFA. Petitioner explicitly invoked "true threat jurisprudence," and suggested that imprisoning him for his postings would be tortious and result in a civil settlement.

> Fold up your PFA and put in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order
> That was improperly granted in the first place
> Me thinks the judge needs an education on true threat jurisprudence
> And prison time will add zeros to my settlement
> Which you won't see a lick
> Because you suck dog dick in front of children
> And if worse comes to worse

> I've got enough explosives
> to take care of the state police and the sheriff's department

App., *infra*, 7a. Above and beneath this post, petitioner had posted a link to the Wikipedia entry on "freedom of speech," including photographs of the Westboro Baptist Church's controversial signs stating, "Thank God for Dead Miners." See Gov't Exh. 5. See generally *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1213 (2011). A post beneath it praised the ACLU for bringing suit to challenge a nearby school district's decision to prohibit wearing "I [heart] Boobies" bracelets in school, which is currently pending on this Court's docket, see *Easton Area Sch. Dist.* v. *B.H.*, No. 13-672 (U.S. filed Dec. 3, 2013).

On November 16, 2010, petitioner posted the following on his Facebook page:

> That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten mile radius
> to initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a kindergarten class
> The only question is . . . which one?

App., *infra*, 7a-8a. The post was made more than two years before the Sandy Hook shootings; one of petitioner's Facebook friends "liked" the post. Gov't Exh. 6. Petitioner testified that his post was a reference to an Eminem song in which the rapper coarsely criticized his ex-wife and fantasized about participat-

ing in the Columbine school shootings.[3] C.A. App. 426.

After learning of petitioner's Facebook posts, FBI Agent Denise Stevens visited petitioner at his house. App., *infra*, 8a. After the visit, petitioner posted a "note" on his Facebook page, a type of composition that requires a reader to click on a link on the member's homepage to be taken to a separate page. The post, which was entitled, "Little Agent Lady," was styled as a rap song, and suggested—contrary to fact—that petitioner had been wearing a bomb during the visit. In it, he describes himself as "just an aspiring rapper," and dismisses as "shit" the agent's belief that he wants to turn "[Lehigh] Valley into Fallujah," joking that if she believed that, he had some "bridge rubble" to sell her. Gov't Exh. 7.

> You know your shit's ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent Lady stood so close
> Took all the strength I had not to turn the bitch ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]

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[3] See Eminem, *I'm Back*, *on* The Marshall Mathers LP (Interscope Records 2000):

> I take seven (kids) from (Columbine), stand 'em all in line
> Add an AK-47, a revolver, a nine
> a MAC-11 and it oughta solve the problem of mine
> and that's a whole school of bullies shot up all at one time
> Cause (I'mmmm) Shady, they call me as crazy
> as the world was over this whole Y2K thing.

So the next time you knock, you best be serving
a warrant
And bring yo' SWAT and an explosives expert
while you're at it
Cause little did y'all know, I was strapped wit'
a bomb
Why do you think it took me so long to get
dressed with no shoes on?
I was jus' waitin' for y'all to handcuff me and
pat me down
Touch the detonator in my pocket and we're all
Goin'

[BOOM!]

Are all the pieces comin' together?
Shit, I'm just a crazy sociopath
that gets off playin' you stupid fucks like a fiddle
And if y'all didn't hear, I'm gonna be famous
Cause I'm just an aspiring rapper who likes the
attention
who happens to be under investigation for
terrorism
cause y'all think I'm ready to turn the Valley into
Fallujah
But I ain't gonna tell you which bridge is gonna
fall
into which river or road
And if you really believe this shit
I'll have some bridge rubble to sell you tomorrow

[BOOM!][BOOM!][BOOM!]

Gov't Exh. 7.

Petitioner did not mail, e-mail, or post this to Agent Stevens, nor did he "tag" her in this (or any

other) post. Aside from the comment on his sister-in-law's status update before issuance of the PFA, petitioner never posted any of his comments at issue anyplace but his own pseudonymous Facebook page, nor did he "tag" anyone in these posts.

B. Procedural History

1. On December 8, 2010, petitioner was arrested and charged with violating 18 U.S.C. § 875(c). App., *infra*, 9a. The grand jury indicted petitioner on five counts: threats to patrons and employees of Dorney Park (Count One); threats to his wife (Count Two); threats to police officers (Count Three); threats involving a kindergarten class (Count Four); and threats to a FBI agent (Count Five). *Ibid.*

Petitioner moved to dismiss the indictment on the ground that the indictment failed to allege that petitioner subjectively intended to threaten, which he argued "was required under the true threat exception to the First Amendment." App., *infra*, 9a. The district court denied the motion. Although the court acknowledged that it "is an interesting question" whether a subjective or objective standard should govern threat prosecutions and that "[c]ourts after *Virginia* v. *Black* are divided as to whether *Black* replaces the objective test with a subjective test," *id.* at 52a-53a, it was constrained under circuit precedent to hold that the objective test governed. Accordingly, it was enough that "a reasonable person could see [petitioner's] posts as threats." *Id.* at 55a.

Petitioner requested that the jury be instructed that "the government must prove that [petitioner] intended to communicate a true threat." C.A. App. 45

(emphasis omitted). The district court denied the request, instead instructing the jury based on an objective standard:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intent to inflict bodily injury or take the life of an individual.

App., *infra*, 11a.

The jury convicted petitioner on Counts Two through Five of the indictment. App., *infra*, 10a. Petitioner filed post-trial motions to dismiss the indictment with prejudice, for a new trial, to arrest judgment, and for dismissal of charges, based in part on his argument that a subjective standard governs. *Ibid.* The district court denied the motions, concluding in relevant part that "[i]t is not required that the defendant intend to make a threat." App., *infra*, 38a; accord *id.* at 40a. The court sentenced petitioner to 44 months' imprisonment, to be followed by three years of supervised release. *Id.* at 10a.

2. The court of appeals affirmed. App., *infra*, 1a-29a. The court held that *United States* v. *Kosma*, 951 F.2d 549 (3d Cir. 1991), involving the related prohibition on threats against the President, see 18 U.S.C. § 871, was "clear" "precedent" (App., *infra*, 13a) governing prosecutions under Section 875(c), and required only proof that "a reasonable person would foresee that the statement would be

interpreted" as a threat, *id.* at 12a (quoting *Kosma*, 951 F.2d at 557). The court rejected the argument that "*Black* indicates a subjective intent to threaten is required." *Id.* at 16a. The court acknowledged that while other federal courts of appeals had agreed with its understanding, *id.* at 17a-18a, "[t]he Ninth Circuit took a different view, and found the true threats definition in *Black* requires the speaker * * * 'intend for his language to *threaten* the victim.'" *Id.* at 20a (quoting *United States* v. *Cassel*, 408 F.3d 622, 631 (9th Cir. 2005)). The court of appeals denied rehearing. *Id.* at 61a-62a.

REASONS FOR GRANTING THE PETITION

A. There Is Acknowledged Conflict On Whether The First Amendment Requires Proof Of Subjective Intent To Threaten

As the Third Circuit recognized, the federal courts of appeals are divided over whether the First Amendment's "true threat" exception requires proof that a defendant prosecuted for making a threatening statement subjectively intended to threaten another person. App., *infra*, 20a. State courts of last resort are likewise in conflict. See pp. 18, 20-21, *infra*. This disagreement reflects widespread confusion among courts nationwide about the implications of this Court's decision in *Virginia* v. *Black*, 538 U.S. 343 (2003). The split is mature and entrenched; as virtually every circuit and state court of last resort has weighed in, there is no reason for further delay. Indeed, the need for this Court's review is particularly acute because the state and federal courts in *eight* states take opposing views, so that the breadth of First Amendment protection turns on the

happenstance of which prosecutor brings charges. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari was granted to resolve conflict between the Eleventh Circuit and the Florida Supreme Court over which First Amendment standard governed a disputed injunction).

1. In the opinion below, the Third Circuit applied an objective standard to determine when a statement constitutes a "true threat." App., *infra*, 17a. The court held that an utterance is an unprotected "true threat" whenever "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *Id.* at 21a (internal quotation marks and citation omitted). The First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have also adopted an objective standard. See *United States* v. *Martinez*, 736 F.3d 981, 988 (11th Cir. 2013); *United States* v. *Jeffries*, 692 F.3d 473, 479-480 (6th Cir. 2012), cert. denied, 134 S. Ct. 59 (2013); *United States* v. *White*, 670 F.3d 498, 508 (4th Cir. 2012); *United States* v. *Mabie*, 663 F.3d 322, 330-332 (8th Cir. 2011), cert. denied, 133 S. Ct. 107 (2012); *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *Porter* v. *Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004); *United States* v. *Nishnianidze*, 342 F.3d 6, 16 (lst Cir. 2003); *United States* v. *Sovie*, 122 F.3d 122, 125 (2d Cir. 1997); but see *United States* v. *Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (con-

cluding that "an entirely objective definition [of 'true threat']" may "no longer [be] tenable" after *Black*).[4]

Numerous state courts of last resort likewise apply an objective test. *See Citizen Publ'g Co.* v. *Miller*, 115 P.3d 107, 114 (Ariz. 2005); *Jones* v. *State*, 64 S.W.3d 728, 736 (Ark. 2002); *People* v. *Lowery*, 257 P.3d 72, 74 (Cal. 2011); *People* v. *Baer*, 973 P.2d 1225, 1231 (Colo. 1999); *State* v. *Moulton*, 78 A.3d 55 (Conn. 2013); *Carrell* v. *United States*, 80 A.3d 163, 170 (D.C. 2013); *State* v. *Valdivia*, 24 P.3d 661, 671-672 (Haw. 2001); *State* v. *Soboroff*, 798 N.W.2d 1, 2 (Iowa 2011); *State ex rel. RT*, 781 So. 2d 1239, 1245-1246 (La. 2001); *Hearn* v. *State*, 3 So. 3d 722, 739 (Miss. 2008); *State* v. *Lance*, 721 P.2d 1258, 1266-1267 (Mont. 1986); *State* v. *Curtis*, 748 N.W.2d 709, 712 (N.D. 2008); *State* v. *Moyle*, 705 P.2d 740, 750-751 (Or. 1985) (en banc); *J.S. ex rel. H.S.* v. *Bethlehem Area Sch. Dist.*, 807 A.2d 847, 858 (Pa. 2002); *Austad* v. *Bd. of Pardons and Paroles*, 719 N.W.2d 760, 766 (S.D. 2006); *State* v. *Johnston*, 127 P.3d 707, 710

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[4] Courts applying an objective standard themselves "disagre[e] regarding the appropriate vantage point—what a person making the statement should have reasonably foreseen or what a reasonable person receiving the statement would believe." *United States* v. *Clemens*, 738 F.3d 1,10 (1st Cir. 2013) (internal quotation marks omitted); accord *United States* v. *Saunders*, 166 F.3d 907, 913 n.6 (7th Cir. 1999) (noting "disagree[ment] about whether the test should be speaker-based or listener-based") (collecting cases). Courts that "uphold criminal threat convictions based solely on the reaction of the reasonable listener," diverge even further from those that, like the Ninth Circuit, look to the subjective intent of the speaker. *Clemens*, 738 F.3d at 12.

(Wash. 2006); *State* v. *Perkins*, 626 N.W.2d 762, 770 (Wis. 2001).

Some of these courts have embraced an objective definition for practical reasons: it "protects listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten." *United States* v. *Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997); accord App., *infra*, 15a (objective definition better protects from "fear of violence"). Before *Black*, many courts adopted an objective standard because the leading precedent, *Watts* v. *United States*, 394 U.S. 705 (1969) (per curiam), had focused on the speech's context, rather than on the speaker's intent, in determining whether the speech was constitutionally protected. See, *e.g.*, *Doe* v. *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (en banc); *Lance*, 721 P.2d at 1266-1267.

Many courts applying an objective standard have adopted (or reaffirmed) the rule post-*Black*. These courts have recognized *Black*'s relevance but have ultimately rejected—or simply ignored—its applicability. Some have construed *Black* narrowly as having overturned the Virginia statute for overbreadth because the statute classified public cross burning as prima facie evidence of an intent to intimidate when it was sometimes protected speech. *E.g.*, *Martinez*, 736 F.3d at 986-987 ("*Black* was primarily a case about the overbreadth of a specific statute—not whether all threats are determined by a subjective or objective analysis in the abstract."); *Jeffries*, 692 F.3d at 479-480; *Mabie*, 663 F.3d at 332; *White*, 670 F.3d at 511.

Many, including the Third Circuit, read *Black* as limited to statutes like the one at issue there, that expressly require subjective intent to threaten, with no bearing on crimes like § 875(c) that do not. App., *infra*, 15a. Some have held that *Black*'s statement that "true threats" "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359, means only that the defendant intentionally uttered the statement, not that he intentionally meant to threaten with it, *White*, 670 F.3d at 509 ("We read the Court's use of the word 'means' in 'means to communicate' to suggest '*intends* to communicate.'"); *Jeffries*, 692 F.3d at 480 (same). Still other courts have recognized *Black*'s relevance but declined to address what, if any, changes the decision worked on the "true threats" doctrine. *United States* v. *Clemens*, 738 F.3d 1, 12 (1st Cir. 2013); *United States* v. *Turner*, 720 F.3d 411, 420 (2d Cir. 2013).

2. In conflict with the decision below, the Ninth Circuit has held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *United States* v. *Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). Under that standard, the speaker "need not actually intend to carry out the threat," *id.* at 631 (internal quotation marks omitted), but must "intend for his language to *threaten* the victim," *ibid.* The supreme courts of Massachusetts, Rhode Island, and Vermont have also adopted this subjective intent standard. *O'Brien* v. *Borowski*, 961 N.E.2d 547, 557 (Mass. 2012) ("The

intent requirements in the act plainly satisfy the 'true threat' requirement that the speaker subjectively intend to communicate a threat.") (citing *Black*, 538 U.S. at 360; *Cassel*, 408 F.3d at 633)); *State* v. *Grayhurst*, 852 A.2d 491, 515 (R.I. 2004) (holding that a "true threat" requires a showing of the speaker's subjective intent to threaten); *State* v. *Miles*, 15 A.3d 596, 599 (Vt. 2011) ("Without a finding that his statement represented an actual intent to put another in fear of harm or to convey a message of actual intent to harm a third party, the statement cannot reasonably be treated as a threat."); see also *State* v. *Pomianek*, 58 A.3d 1205, 1217 (N.J. App. Div. 2013).

Courts adopting a subjective intent standard have held that this Court's decision in *Black* requires it. In *Cassel*, for example, Judge O'Scannlain, joined by Judges Bea and Cowen, concluded that "the clear import of this [Court's] definition" of "true threats" in *Black*—*i.e.*, "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359—"is that only *intentional* threats are criminally punishable consistently with the First Amendment." *Cassel*, 408 F.3d at 631; accord *O'Brien*, 961 N.E.2d at 426; *Grayhurst*, 852 A.2d at 515; *State* v. *Cahill*, 80 A.3d 52, 57 (Vt. 2013). The Ninth Circuit rejected the objective intent standard other circuits employed, explaining that those courts had offered "no explanation of how the prima facie evidence provision in *Black* could offend the First Amendment if intent to intimidate were constitutionally irrelevant." 408 F.3d at 633 n.10; see also *United*

States v. *Stewart*, 420 F.3d 1007, 1017 (9th Cir. 2005) (describing *Black* as "irreconcilable" with an "objective 'true threat' definition").[5]

Other courts have indicated in dicta that only the subjective standard can be squared with *Black*. In *United States* v. *Parr*, for example, the Seventh

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[5] Though the Ninth Circuit later cited pre-*Black* precedent referencing an objective test when reviewing a conviction under 18 U.S.C. § 871 (threats against the President), see *United States* v. *Romo*, 413 F.3d 1044, 1050-1051 (2005), the defendant in that case had not raised a First Amendment challenge to his conviction and the Ninth Circuit limited its holding to the presidential threats statute, *see id.* at 1051 n.6. The Ninth Circuit has since clarified that the subjective intent test is the rule of the circuit. *Bagdasarian*, 652 F.3d at 1117-1118 n.14 ("To the extent that we may have suggested otherwise in a footnote in *Romo*, [failing to apply a subjective intent test] would be inconsistent with *Black* * * *. In all * * * circumstances in which pure speech is prosecuted under a threat statute, we cannot apply exclusively an objective standard, and any subjective test must incorporate the constitutional requirement set forth in *Black*.") (citation omitted).

The Ninth Circuit has consistently applied a subjective intent standard since *Bagdasarian*. See, *e.g.*, *United States* v. *Keyser*, 704 F.3d 631, 638 (2012) (noting, when interpreting 18 U.S.C. § 876(c), that "in order to be subject to criminal liability for a threat, the speaker must subjectively intend to threaten") (citing *Bagdasarian*, 652 F.3d at 1117-1118); *United States* v. *Cook*, No. 12-50128, 2013 WL 5718210, at *1 (Oct. 22, 2013) (citing *Bagdasarian* and applying the subjective intent standard when reviewing a § 875(c) conviction); *United States* v. *Williams*, 492 F. App'x 777, 779 (2012) (citing *Cassel* and applying a subjective intent standard when reviewing a conviction under 18 U.S.C. § 875(b)); *United States* v. *Heizelman*, 472 F. App'x 584, 585 (2012) (citing *Bagdasarian* for proposition that the "subjective test 'must be read into all threat statutes that criminalize pure speech'").

Circuit concluded that although "[i]t is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*[,] it is more likely * * * that an entirely objective definition is no longer tenable." 545 F.3d at 500 (citing *Cassel*, 408 F.3d at 631-633); accord *White*, 670 F.3d at 520 (Floyd, J., concurring in part and dissenting in part) ("*Black* * * * makes our purely objective approach to ascertaining threats no longer tenable."). Similarly, in *United States* v. *Magleby*, the Tenth Circuit recognized that in order for a communication to rise to the level of a "true threat," as defined by *Black*, it "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" 420 F.3d at 1139 (quoting *Black*, 538 U.S. at 359).

3. Underscoring the urgent need for this Court's review, at least *eight* state courts of last resort have adopted a standard conflicting with that of the regional federal circuit. The First Circuit, for example, applies an objective test, see *Nishnianidze*, 342 F.3d at 16, but both Massachusetts and Rhode Island apply a subjective one, see *O'Brien*, 961 N.E.2d at 557 (Massachusetts); *Grayhurst*, 852 A.2d at 515 (Rhode Island). While the Second Circuit employs an objective test, see *Sovie*, 122 F.3d at 125, Vermont applies a subjective standard, see *Miles*, 15 A.3d at 599. California, Hawaii, Montana, Oregon, and Washington all apply an objective definition of "true threats," in conflict with the Ninth Circuit's subjective intent standard. Compare *Lowery*, 257 P.3d at 74 (California), *Valdivia*, 24 P.3d at 671-672 (Hawaii), *Lance*, 721 P.2d at 1266-1267 (Montana), *Moyle*, 705 P.2d at 750-751 (Oregon), and *Johnston*,

127 P.3d at 710 (Washington), with *Cassel*, 408 F.3d at 633; see also *Pomianek*, 58 A.3d at 1217 (New Jersey; subjective); App., *infra*, 16a (objective).

These state-federal conflicts deprive speakers of notice of the standard that will govern the exercise of their First Amendment rights, and they must then decide whether to speak based on the most restrictive interpretataion to which they are subject. The uncertainty is exacerbated by the broad reach of the federal venue statute, 18 U.S.C. § 3237, which establishes venue not only in the jurisdiction where an alleged threat is *made* but also where it is *read*. See, *e.g.*, *Jeffries*, 692 F.3d at 483 (holding that venue under 18 U.S.C. § 875(c) was proper in the jurisdiction where threats were received); see also *Turner*, 720 F.3d at 418, 435 (New Jersey man charged in Illinois, where the victims received threats; case then transferred to New York).

The uncertainty is particularly pronounced for communications made using the Internet, where statements that are prosecuted are increasingly made. Unlike traditional mail, which is sent to a specific address in a known jurisdiction, e-mail, Facebook messages, and other online communications can be read anywhere, with the applicable legal standard turning on the happenstance of whether the message was read while the recipient was at home, the office, on a business trip, on vacation, or when deployed with the military. And the growing use of joint federal-state investigations increases the risk of opportunistic behavior by law enforcement officials, who would have an incentive to prosecute the case in whichever jurisdiction applied the objective test. A

speaker facing this level of uncertainty may choose the safety of self-censorship. "The threat of sanctions may deter [exercise of First Amendment freedoms] almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). Only this Court's review can establish a national rule that eliminates an intolerably high risk of self-censorship.

B. The Third Circuit's Rule Is Wrong

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. amend. I. The "bedrock principle underlying the First Amendment * * * is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989); accord *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). Accordingly, the Constitution "demands that content-based restrictions on speech be presumed invalid, and that the government bear the burden of showing their constitutionality." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004) (citation omitted).

Broad First Amendment protections are subject to only narrow exceptions "in a few limited areas" where speech or expressive conduct is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *R.A.V.*, 505 U.S. at 382-383 (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)). For example, states may punish speech or conduct that is obscene, libelous,

"fighting words," *Chaplinsky*, 315 U.S. at 572, or that constitutes incitement, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam). In *Watts* v. *United States*, 394 U.S. at 708, this Court carved out a limited exception for "true threats." *Watts* involved a prosecution for threatening the President, see 18 U.S.C. § 871(a), based on a protester's statement, made during a draft-protest rally, that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court concluded that Watts's remark was not a true threat based on its context—it was made at a political rally, was conditioned on an unlikely event (the speaker's induction into the armed forces), and the crowd responded with laughter. *Id.* at 707-708. The Court did not have occasion to address whether intent to threaten might be a required element of demonstrating that a statement was an unprotected "true threat."

1. *Black* Recognized A First Amendment Subjective Intent Requirement For Statutes Criminalizing Threats

The Court returned to the true threats doctrine in *Virginia* v. *Black*, explaining that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359 (citations omitted; emphasis added). The Court continued, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the

victim in fear of bodily harm or death." *Id.* at 360 (emphasis added).

Those statements were central to the Court's reasoning. *Black* involved a Virginia statute that criminalized burning a cross in public "with the intent of intimidating any person," 538 U.S. at 347-348 (quoting Va. Code Ann. § 18.2-423 (1996)), and provided that the public burning of a cross "shall be prima facie evidence of an intent to intimidate." *Ibid.* A plurality of the Court further explained the constitutional necessity of a subjective intent requirement. Justice O'Connor, joined by the Chief Justice and Justices Stevens and Breyer, concluded that the prima facie evidence provision was facially unconstitutional because it "permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself," when "a burning cross is not always intended to intimidate." *Id.* at 365. Rather, cross burning can have two different meanings, depending on the speaker's intent: (1) "constitutionally proscribable intimidation" or (2) "core political speech," when used as a statement of ideology or expression of group solidarity. *Id.* at 365-366. But "the prima facie evidence provision * * * ignores all the contextual factors that are necessary to decide whether a particular cross burning was intended to intimidate. The First Amendment does not permit such a shortcut." *Id.* at 367.

If "true threats" doctrine did not require a showing of intent to threaten, the Court would have had no basis for invalidating the Virginia statute for its failure to limit its reach to only those cross burnings

undertaken *with a purpose* to threaten or intimidate. The requirement that the speaker intends his speech to be threatening was thus central to the Court's holding. See Leslie Kendrick, *Speech, Intent and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1648 n. 72 (2013) (concluding that in *Black*, "the Supreme Court constitutionalized" the Virginia statute's "specific-intent requirement"); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217 ("[I]t is plain that * * * the *Black* majority (and, perhaps, the *Black* dissenters as well) believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate."). Indeed, "each of the other opinions" in *Black*—"with the possible exception of Justice Thomas's dissent," which viewed cross burning as non-expressive conduct undeserving of First Amendment protection—"takes the [plurality's] view of the necessity of an intent element." *Cassel*, 408 F.3d at 632. See generally *Black*, 538 U.S. at 372 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[t]he plurality is correct" that it is "constitutionally problematic" to convict someone for burning a cross when the action is not intended to intimidate).

2. Core First Amendment Principles Require Use Of A Subjective-Intent Standard

Black reflects basic principles of First Amendment law. In safeguarding the free interchange of ideas, the First Amendment's protection does not extend merely to thoughtful, deliberate, well-reasoned

speech. In fact, the vitality of the First Amendment derives from its protection of even speech that is offensive, impulsive, or negligent. Because "erroneous statement is inevitable in free debate," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964), such speech must be protected so that constitutionally protected speech has enough "breathing space to survive." *NAACP* v. *Button*, 371 U.S. at 433.

Employing an objective standard for identifying "true threats" is fundamentally inconsistent with that principle—particularly in a criminal statute. As Justice Marshall explained:

> In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes, see *Morissette* v. *United States*, 342 U.S. 246 (1952); we should be particularly wary of adopting such a standard for a statute that regulates pure speech.

Rogers v. *United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring); accord *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*) ("what an objective test does" is "reduc[e] culpability on the all-important element of [§ 875(c)] to negligence"; doing so is inconsistent with "[b]ackground norms for construing criminal statutes," which "presume that intent is the required mens rea in criminal laws"). Thus, the "objective construction" of true threats "would create a substantial risk that crude, but constitutionally protected, speech might be criminalized," particularly when that speech concerns "merely

crude or careless expression of political enmity." *Rogers*, 422 U.S. at 43-44 (Marshall, J., concurring).

The notion that one could commit a "speech crime" *by accident* is chilling: Imprisoning a person for negligently misjudging how others would construe his words is fundamentally inconsistent with basic First Amendment principles and would erode the breathing space that safeguards the free exchange of ideas. To take just one example, in *United States* v. *Fulmer*, an informant who had reported a suspected bankruptcy fraud was convicted of threatening an FBI agent because he left the agent a voicemail saying that the "silver bullets are coming." 108 F.3d 1486, 1490 (1st Cir. 1997). The agent, unfamiliar with the term "silver bullets" to describe a simple solution for a problem, found the phrase to be "chilling" and "scary." *Ibid.* Despite the testimony of two witnesses that the defendant had repeatedly used the term "silver bullets" to refer to "clear-cut" evidence of wrongdoing, *ibid.*, the court concluded that, using an objective standard, the defendant could be convicted of threatening the agent. *Id.* at 1491-1492. This criminalization of "poorly chosen words," Rothman, 25 Harv. J.L. & Pub. Pol'y at 350, inevitably chills speech, "as individuals would have difficulty discerning what a jury would consider objectively threatening and may rationally err on the side of caution by saying nothing at all." Recent Case, *United States* v. *Jeffries*, 126 Harv. L. Rev. 1138, 1145 (2012).

For this reason, First Amendment doctrine in many contexts imposes "*mens rea* requirements that provide 'breathing room' * * * by reducing an honest

speaker's fear that he may accidentally incur liability for speaking." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment). Thus, for example, public figures alleging defamation with respect to a matter of public interest must demonstrate the speaker acted with "'actual malice'—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U.S. at 276. Similarly, prosecution for incitement requires proof the defendant's "advocacy of the use of force * * * is *directed to* inciting or producing imminent lawless action," *Brandenburg*, 395 U.S. at 447 (emphasis added); permitting conviction absent such proof would "sweep within its condemnation speech which our Constitution has immunized from governmental control." *Ibid.*; accord *Alvarez*, 132 S. Ct. at 2544 (plurality opinion) (concluding that the First Amendment permits restrictions on "advocacy *intended*, and likely, to incite imminent lawless action") (emphasis added). And Members of this Court have concluded that construing prohibitions on false statements to apply only to "statements made with knowledge of their falsity and with the *intent* that they be taken as true * * * diminishes the extent to which the statute endangers First Amendment values" by reducing the risk of "accidentally incur[ring] liability for speaking." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) (emphasis added).

Focusing on the speaker's subjective intent protects speech in a second respect. Objective tests tend to focus on the reaction of "a reasonable

recipient of the statement." Rothman, 25 Harv. J.L. & Pub. Pol'y at 288. As this Court has observed, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). Statements by unpopular speakers are more likely to be deemed threatening than equivalent statements of popular (or powerful) ones, and thus are more likely to result in criminal liability.[6] Cf. *Alvarez*, 132 S. Ct. at 2553 ("[T]hose who are unpopular may fear that the government will use [the prosecution of false statements] selectively, * * * while ignoring members of other political groups who might make similar false claims."). But it is a basic tenet of First Amendment law that "[s]peech cannot be * * * burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth Cnty.*, 505 U.S. at 134-135. Use of a subjective intent standard would act as a safeguard against potentially discriminatory enforcement.

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[6] See, *e.g.*, Adam Edelman & Joseph Straw, *New York Rep. Michael Grimm threatens reporter after being asked about fundraising allegations*, N.Y. Daily News, Jan. 23, 2014, http://goo.gl/XW6sys (reporting that a Member of Congress, who is a "former Marine and FBI agent," told a reporter inquiring about campaign finance investigation, "you ever do that again, I'll throw you off this f-----g balcony," "I'll break you in half"). Petitioner's posts certainly involve no more violent imagery than songs by any one of scores of popular rappers, including the Eminem songs about the rapper's ex-wife that inspired several of petitioner's posts.

C. This Case Squarely Presents A Recurring Issue Of Substantial Legal And Practical Importance

The standard governing threat prosecutions is unquestionably an important issue. The Department of Justice has brought hundreds of Section 875(c) prosecutions since *Black* was decided. See U.S. Dep't of Justice, *Bureau of Justice Statistics: Federal Criminal Case Processing Statistics*, http://www.bjs.gov/fjsrc/tsec.cfm (last accessed Jan. 25, 2014). And just since the Third Circuit decision below, two other circuit courts have issued opinions on this precise issue, see *Clemens*, 738 F.3d 1; *Martinez*, 736 F.3d 981, and a third has held argument on it, *United States* v. *Heineman*, No. 13-4043 (10th Cir.). That represents just a fraction of the total number of criminal prosecutions implicating "true threats" doctrine. There are a number of other federal statutes that also implicate the issue, such as 18 U.S.C. § 871 (involving presidential threats). And most, if not all, states have enacted statutes analogous to Section 875(c).[7]

The issue is growing in importance as communication online by email and social media has

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[7] *E.g.*, Ala. Code § 13A-10-15 (West 2013); Ark. Code Ann. § 5-13-301 (West 2013); Cal. Penal Code § 140 (West 2014); Conn. Gen. Stat. Ann. § 53a-183 (West 2014); D.C. Code § 22-407 (West 2013); Fla. Stat. Ann. § 836.10 (West 2013); Haw. Rev. Stat. § 707-716 (West 2013); Iowa Code Ann. § 712.8 (West 2013); Mich. Comp. Laws Ann. § 750.411i (West 2013); Okla. Stat. Ann. tit. 21, § 1378 (West 2013); Va. Code Ann. § 18.2-60 (West 2013); Wash. Rev. Code Ann. § 9.61.160 (West 2013); Wis. Stat. Ann. § 940.203 (West 2013).

become commonplace, even as the norms and expectations for such communication remain unsettled. The inherently impersonal nature of online communication makes such messages inherently susceptible to misinterpretation. "Especially in the context of Internet postings, where the tone and mannerisms of the speaker are unknown, an objective analysis turns almost entirely on the exact words used." Kyle A. Mabe, Note, *Long Live the King:* United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 Golden Gate U. L. Rev. 51, 89 (2013); see also Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?*, 89 J. Personality & Soc. Psychol. 925, 933 (2005) ("[g]esture, voice, expression, context," do "more than merely *supplement* linguistic information, [they] alter it completely").[8]

Moreover, modern media allow personal reflections intended for a small audience (or *no* audience) to be viewed widely by people who are unfamiliar with the context in which the statements were made and thus who may interpret the statements much differently than the speaker intended. Internet-based communication has thus "eroded the shared frame of background context that allowed speakers and hearers to apply context to language,"

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[8] For example, a school district closed for a day because of a "Facebook misunderstanding," after a student's Facebook post mentioned the words "combine" (which was mistaken for "Columbine") and "revenge." John Noel, *NY School District Shut Down Over Facebook Misunderstanding*, NBC 4 New York, Mar. 1, 2010, http://goo.gl/F1ac0i.

increasing the significance of courts' refusal to consider a speaker's intent. Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. Rev. 43, 72 (2011). It is therefore unsurprising that online statements have proven to be a major basis (perhaps the *leading* basis) for criminal threat prosecutions. *E.g.*, *Bagdasarian*, 652 F.3d 1113 (Yahoo message board posting); *United States* v. *Stock*, No. 11-182, 2012 WL 202761 (W.D. Pa. Jan. 23, 2012) (defendant charged for threatening Craigslist advertisement); Bianca Prieto, *Polk County Man's Rap Song Called Threat to Cops, So He's in Jail for 2 Years*, Orlando Sentinel, Aug. 1, 2009, http://goo.gl/WRGOQ3.

This case presents an ideal opportunity to resolve this important and recurring issue. The issue was squarely presented and thoroughly discussed. The case's procedural history reveals no disputed issues of fact nor any jurisdictional questions that would interfere with this Court's resolution of the question. The issue has been thoroughly analyzed by numerous federal and state courts. The issue is ripe for review, and nothing would be gained from delaying review further.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr, 13th Floor
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

FEBRUARY 2014

Appendix

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3798

UNITED STATES OF AMERICA

v.

ANTHONY DOUGLAS ELONIS,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Criminal No. 5-11-cr-00013-001
(Honorable Lawrence F. Stengel)

Argued: June 14, 2013

Before: SCIRICA, HARDIMAN, and ALDISERT,
Circuit Judges

(Filed: September 19, 2013)

Ronald H. Levine, Esq. [ARGUED]
Abraham J. Rein, Esq.
Post & Schell
1600 John F. Kennedy Boulevard
Four Penn Center, 14th Floor
Philadelphia, PA 19103

Counsel for Appellant

Sherri A. Stephan, Esq.
Office of United States Attorney
504 West Hamilton Street
Suite 3701
Allentown, PA 18101

Robert A. Zauzmer, Esq. [ARGUED]
Office of United States Attorney
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106

Counsel for Appellee

OPINION OF THE COURT

SCIRICA, *Circuit Judge*

This case presents the question whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats. Anthony Elonis challenges his jury conviction under 18 U.S.C. § 875(c), arguing he did not subjectively intend his Facebook posts to be threatening. In *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) we held a statement is a true threat when a reasonable speaker would foresee the statement would be interpreted as a threat. We consider whether the Supreme Court decision in *Virginia v. Black*, 538 U.S. 343, 359 (2003), overturns this standard by requiring a subjective intent to threaten.

I.

In May 2010, Elonis's wife of seven years moved out of their home with their two young children. Following this separation, Elonis began experiencing trouble at work. Elonis worked at Dorney Park & Wildwater Kingdom amusement park as an operations supervisor and a communications technician. After his wife left, supervisors observed Elonis with his head down on his desk crying, and he was sent home on several occasions because he was too upset to work.

One of the employees Elonis supervised, Amber Morrissey, made five sexual harassment reports against him. According to Morrissey, Elonis came into the office where she was working alone late at night, and began to undress in front of her. She left the building after he removed his shirt. Morrissey also reported another incident where Elonis made a minor female employee uncomfortable when he placed himself close to her and told her to stick out her tongue. On October 17, 2010 Elonis posted on his Facebook page a photograph taken for the Dorney Park Halloween Haunt. The photograph showed Elonis in costume holding a knife to Morrissey's neck. Elonis added the caption "I wish" under the photograph. Elonis's supervisor saw the Facebook posting and fired Elonis that same day.

Two days after he was fired, Elonis began posting violent statements on his Facebook page. One post regarding Dorney Park stated:

> Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must

> have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

Elonis also began posting statements about his estranged wife, Tara Elonis, including the following: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder." Several of the posts about Tara Elonis were in response to her sister's status updates on Facebook. For example, Tara Elonis's sister posted her status update as: "Halloween costume shopping with my niece and nephew should be interesting." Elonis commented on this status update, writing, "Tell [their son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [Tara Elonis's] head on a stick?" Elonis also posted in October 2010:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.

Based on these statements a state court issued Tara Elonis a Protection From Abuse order against Elonis on November 4, 2010. Following the issuance

of the state court Protection From Abuse order, Elonis posted several statements on Facebook expressing intent to harm his wife. On November 7 he wrote:[1]

> Did you know that it's illegal for me to say I want to kill my wife?
> It's illegal.
> It's indirect criminal contempt.
> It's one of the only sentences that I'm not allowed to say.
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.
> I'm not actually saying it.
> I'm just letting you know that it's illegal for me to say that.
> It's kind of like a public service.
> I'm letting you know so that you don't accidently go out and say something like that
> Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.
> That's illegal.
> Very, very illegal.
> But not illegal to say with a mortar launcher.
> Because that's its own sentence.
> It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.
> Perfectly legal.
> I also found out that it's incredibly illegal,

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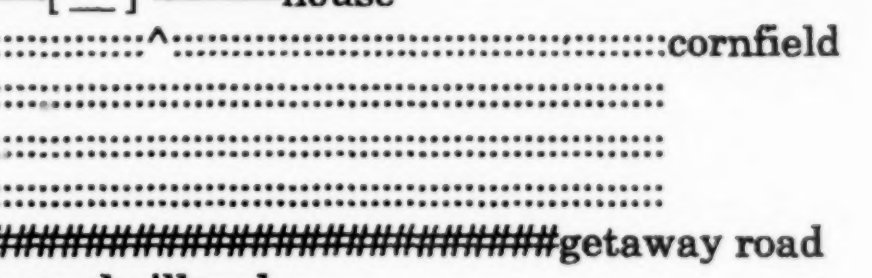
[1] This statement was the basis of Count 2 of the indictment.

extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal. Yet even more illegal to show an illustrated diagram.



Insanely illegal.

Ridiculously, horribly felonious.

Cause they will come to my house in the middle of the night and they will lock me up.

Extremely against the law.

Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

Tara Elonis testified at trial that she took these statements seriously, saying, "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives." Trial Tr. 97, Oct. 19, 2011. Ms. Elonis further testified that Elonis rarely listened to rap music, and that she had never seen Elonis write rap lyrics during their seven years of marriage. She explained that the lyric form of the statements did not make her take the threats any less seriously.

On November 15 Elonis posted on his Facebook page:

> Fold up your PFA and put it in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order
> That was improperly granted in the first place
> Me thinks the judge needs an education on true threat jurisprudence
> And prison time will add zeroes to my settlement
> Which you won't see a lick
> Because you suck dog dick in front of children
> ****
>
> And if worse comes to worse
> I've got enough explosives
> to take care of the state police and the sheriff's department
> [link: Freedom of Speech, www.wikipedia.org]

This statement was the basis both of Count 2, threats to Elonis's wife, and Count 3, threats to local law enforcement. A post the following day on November 16 involving an elementary school was the basis of Count 4:

> That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten mile radius
> to initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a kindergarten class
> The only question is . . . which one?

By this point FBI Agent Denise Stevens was monitoring Elonis's public Facebook postings,

because Dorney Park contacted the FBI claiming Elonis had posted threats against Dorney Park and its employees on his Facebook page. After reading these and other Facebook posts by Elonis, Agent Stevens and another FBI agent went to Elonis's house to interview him. When the agents knocked on his door, Elonis's father answered and told the agents Elonis was sleeping. The agents waited several minutes until Elonis came to the door wearing a t-shirt, jeans, and no shoes. Elonis asked the agents if they were law enforce-ment and asked if he was free to go. After the agents identified themselves and told him he was free to go, Elonis went inside and closed the door. Later that day, Elonis posted the following on Facebook:

> You know your shit's ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent Lady stood so close
> Took all the strength I had not to turn the bitch ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
> And bring yo' SWAT and an explosives expert while you're at it
> Cause little did y'all know, I was strapped wit' a bomb
> Why do you think it took me so long to get dressed with no shoes on?

I was jus' waitin' for y'all to handcuff me and pat me down
Touch the detonator in my pocket and we're all goin'

[BOOM!]

These statements were the basis of Count 5 of the indictment. After she observed this post on Elonis's Facebook page, Agent Stevens contacted the U.S. Attorney's Office.

II.

Elonis was arrested on December 8, 2010 and charged with transmitting in interstate commerce communications containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c). The grand jury indicted Elonis on five counts of making threatening communications: Count 1 threats to patrons and employees of Dorney Park & Wildwater Kingdom, Count 2 threats to his wife, Count 3 threats to employees of the Pennsylvania State Police and Berks County Sheriff's Department, Count 4 threats to a kinder-garten class, and Count 5 threats to an FBI agent.

Elonis moved to dismiss the indictments against him, contending the Supreme Court held in *Virginia v. Black*, 538 U.S. 343, 347-48 (2003) that a subjective intent to threaten was required under the true threat exception to the First Amendment and that his statements were not threats but were protected speech. The District Court denied the motion to dismiss because even if the subjective intent standard applied, Elonis's intent and the attendant circumstances showing whether or not the state-

ments were true threats were questions of fact for the jury. *United States v. Elonis*, No. 11-13, 2011 WL 5024284, at *3 (E.D. Pa. Oct. 20, 2011).

Elonis testified in his own defense at trial. A jury convicted Elonis on Counts 2 through 5, and the court sentenced him to 44 months' imprisonment followed by three years supervised release. Elonis filed a post-trial Motion to Dismiss Indictment with Prejudice under Rule 12(b)(3); and for New Trial under Rule 33(a), to Arrest Judgment under Rule 34(b) and/or Dismissal under Rule 29(c). The District Court denied the motion to dismiss the indictment, finding the indictment correctly tracked the language of the statute and stated the nature of the threat, the date of the threat and the victim of the threat. The court also stated the objective intent standard conformed with Third Circuit precedent. The court found the evidence supported the jury's finding that the statements in Count 3 and Count 5 were true threats. Finally, the court held that the jury instruction presuming communications over the internet were transmitted through inter-state commerce was supported by our precedent in *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006).

III.[2]

A.

Elonis was convicted under 18 U.S.C. § 875(c) for "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another . . . ." Elonis contends the trial court incorrectly instructed the jury on the standard of a true threat. The court gave the following jury instruction:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

Trial Tr. 127, Oct. 20, 2011. Elonis posits that the Supreme Court decision in *Virginia v. Black* requires that a defendant subjectively intend to threaten, and overturns the reasonable speaker

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[2] The District Court had jurisdiction over this case under 18 U.S.C. § 3231. We exercise appellate jurisdiction under 28 U.S.C. § 1291. We review statutory interpretations and conclusions of law de novo. *Kosma*, 951 F.2d at 553. We exercise plenary review over the sufficiency of indictments. *United States v. Kemp*, 500 F.3d 257, 280 (3d Cir. 2007). "We apply a particularly deferential standard of review when deciding whether a jury verdict rests on legally sufficient evidence." *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998). Because Elonis failed to object to the jury instructions at trial, we review whether the jury instructions stated the correct legal standard for plain error. *United States v. Lee*, 612 F.3d 170, 191 (3d Cir. 2010).

standard we articulated in *United States v. Kosma*, 951 F.3d 549, 557 (3d Cir. 1991).

In *United States v. Kosma*, we held a true threat requires that

> the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion.

Id. at 557 (quoting *Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969) (emphasis omitted)). We rejected a subjective intent requirement that the defendant "intended at least to convey the impression that the threat was a serious one." *Id.* at 558 (quoting *Rogers v. United States*, 422 U.S. 35, 46 (1975) (Marshall, J., concurring)). We found "any subjective test potentially frustrates the purposes of section 871—to prevent not only actual threats on the President's life, but also the harmful consequences which flow from such threats." *Id.* (explaining "it would make prosecution of these threats significantly more difficult"). We have held the same "knowingly and willfully" mens rea *Kosma* analyzed under 18 U.S.C. § 871, threats against the president, applies to § 875(c). *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) (holding "the government bore only the burden of proving that Himelwright acted knowingly and willfully when he placed the threatening telephone calls and that those calls were

reasonably perceived as threatening bodily injury"). Since our precedent is clear, the question is whether the Supreme Court decision in *Virginia v. Black* overturned this standard.

The Supreme Court first articulated the true threats exception to speech protected under the First Amendment in *Watts v. United States*, 394 U.S. 705 (1969). During a rally opposing the Vietnam war, Watts told the crowd, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706 (internal quotation marks omitted). The Court reversed his conviction for making a threat against the president because the statement was "political hyperbole," rather than a true threat. *Id.* at 708. The Court articulated three factors supporting its finding: 1. the context was a political speech; 2. the statement was "expressly conditional"; and 3. "the reaction of the listeners" who "laughed after the statement was made." *Id.* at 707-08. The Court did not address the true threats exception again until *Virginia v. Black* in 2003.[3]

In *Virginia v. Black* the Court considered a Virginia statute that banned burning a cross with the "intent of intimidating" and provided "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." 538 U.S. at 348 (citation and internal quotation marks omitted). The Court reviewed three separate convictions of defendants under the statute and concluded that intimidating cross burning could be

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[3] The Court did discuss the constitutional limits on banning "fighting words" in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

proscribed as a true threat under the First Amendment. *Id.* at 363. But the prima facie evidence provision violated due process, because it permitted a jury to convict whenever a defendant exercised his or her right to not put on a defense. *Id.* at 364-65.

The Court reviewed the historic and contextual meanings behind cross burning, and found it conveyed a political message, a cultural message, and a threatening message, depending on the circumstances. *Id.* at 354-57. The Court then described the true threat exception generally before analyzing the Virginia statute:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See Watts v. United States*, *supra*, at 708 . . . ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*,

> the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

Id. at 359-60 (citation omitted). Elonis contends that this definition of true threats means that the speaker must both intend to communicate and intend for the language to threaten the victim.[4] But the Court did not have occasion to make such a sweeping holding, because the challenged Virginia statute already required a subjective intent to intimidate. We do not infer from the use of the term "intent" that the Court invalidated the objective intent standard the majority of circuits applied to true threats.[5] Instead, we read "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to mean that the

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[4] Elonis also points to the passage "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360. But this sentence explains when intimidation can be a true threat, and does not define when threatening language is a true threat.

[5] *See, e.g.*, *United States v. Whiffen*, 121 F.3d 18, 20-21 (1st Cir. 1997); *United States v. Francis*, 164 F.3d 120, 122 (2d Cir. 1999); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994); *United States v. Myers*, 104 F.3d 76, 80-81 (5th Cir. 1997); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991); *United States v. Hart*, 457 F.2d 1087, 1091 (10th Cir. 1972); *United States v. Callahan*, 702 F.2d 964, 965 (11th Cir. 1983); *Metz v. Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986).

speaker must intend to make the communication. It would require adding language the Court did not write to read the passage as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence." *Id.* at 359. This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception.

The "prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* at 360 (quoting *R.A.V.*, 505 U.S. at 388). Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from "the fear of violence" and the "disruption that fear engenders," because it would protect speech that a reasonable speaker would understand to be threatening. *Id.*

Elonis further contends the unconstitutionality of the prima facie evidence provision in *Black* indicates a subjective intent to threaten is required. The Court found the fact that the defendant burned a cross could not be prima facie evidence of intent to intimidate. *Id.* at 364-65. The Court explained that while cross burning was often employed as intimidation or a threat of physical violence against others, it could also function as a symbol of solidarity for those within the white supremacist movement. *Id.* at 365-66. Less frequently, crosses had been burned outside of the white supremacist context, such as

stage performances. *Id.* at 366. Since the burning of a cross could have a constitutionally-protected political message as well as a threatening message, the prima facie evidence provision failed to distinguish protected speech from unprotected threats. Furthermore, the prima facie evidence provision denied defendants the right to not put on a defense, since the prosecution did not have to produce any evidence of intent to intimidate, which was an element of the crime. *Id.* at 364-65.

We do not find that the unconstitutionality of Virginia's prima facie evidence provision means the true threats exception requires a subjective intent to threaten. First, the prima facie evidence provision did not allow the factfinder to consider the context to construe the meaning of the conduct, *id.* at 365-66, whereas the reasonable person standard does encompass context to determine whether the statement was a serious expression of intent to inflict bodily harm. Second, cross-burning is conduct that may or may not convey a meaning, as opposed to the language in this case which has inherent meaning in addition to the meaning derived from context. Finally, the prima facie evidence provision violated the defendant's due process rights to not put on a defense, because the defendant could be convicted even when the prosecution had not proven all the elements of the crime. *Id.* That is not an issue here because the government had to prove that a reasonable person would foresee Elonis's statements would be understood as threats.

The majority of circuits that have considered this question have not found the Supreme Court decision

in *Black* to require a subjective intent to threaten. *See United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("A careful reading of the requirements of § 875(c), together with the definition from *Black*, does not, in our opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement into § 875(c) . . . ."); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) ("[T]he position reads too much into *Black*."); *United States v. Mabie*, 663 F.3d 322, 332-33 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 107 (2012) (noting the objective test had been applied many times after *Black*)[6]; *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013) (quoting extensively from *Jeffries*, the court "concluded § 875(c) does not require the government to prove a defendant specifically intended his or her statements to be threatening").

The Fourth Circuit in *United States v. White* considered the same criminal statute, 18 U.S.C. § 875(c), and found the Court in *Black* "gave no

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[6] The Eighth Circuit cited the following cases applying an objective standard after the Supreme Court's decision in *Black*:

> *United States v. Beale*, 620 F.3d 856, 865 (8th Cir. 2010) . . . ; *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) (applying an objective test in a true threat analysis); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616–17 (5th Cir. 2004) ("[T]o lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person."); *United States v. Zavrel*, 384 F.3d 130, 136 (3d Cir. 2004) (applying an objective test in a true threat analysis).

Mabie, 663 F.3d at 332.

indication it was redefining a general intent crime such as § 875(c) to be a specific intent crime." 670 F.3d at 509. The Fourth Circuit reasoned that *Black* had analyzed a statute that included a specific intent element, whereas § 875(c) had consistently been applied as a general intent statute. *Id.* at 508. The court further distinguished *Black* by noting the multiple meanings of cross-burning necessitated a finding of intent to distinguish protected speech from true threats. *Id.* at 511. The court in *White* found this same problem did not exist for threatening language because it has no First Amendment value. *Id.* Finally, the court found the general intent standard for § 875(c) offenses did not chill "statements of jest or political hyperbole" because "any such statements will, under the objective test, always be protected by the consideration of the context and of how a reasonable recipient would understand the statement." *Id.* at 509.[7]

In *United States v. Jeffries* the Sixth Circuit agreed that *Black* does not require a subjective intent to threaten to convict under 18 U.S.C. § 875(c). 692 F.3d at 479. Because *Black* interpreted a statute that already had a subjective intent requirement, the Sixth Circuit found the Court was not presented with the question whether an objective intent standard is constitutional. *Id. Jeffries* also found that the Court's ruling on the prima facie evidence provision did not

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[7] The Fourth Circuit test focuses on the reasonable recipient, but our test asks whether a reasonable speaker would foresee the statement would be understood as a threat.

address the specific intent question because "the statute lacked any standard at all." *Id.* at 479-80. Like the Fourth Circuit in *White*, the Sixth Circuit explained that the prima facie evidence provision failed to distinguish between protected speech and threats by not allowing for consideration of any contextual factors. *Id.* at 480. In contrast, "[t]he reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made." *Id.*

The Ninth Circuit took a different view, and found the true threats definition in *Black* requires the speaker both intend to communicate and "intend for his language to *threaten* the victim." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005). The Ninth Circuit reasoned that the unconstitutionality of the prima facie provision meant that the Court required a finding of intent to threaten for all speech labeled as "true threats," and not just cross burning. *Id.* at 631-32 ("[T]he prima facie evidence provision rendered the statute facially unconstitutional because it effectively eliminated the intent requirement."). "We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633.[8]

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[8] Similarly, in *United States v. Bagdasarian* the Ninth Circuit wrote in dicta that, in light of *Black*, "[a] statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal." 652 F.3d 1113, 1122 (9th Cir. 2011).

Regardless of the state of the law in the Ninth Circuit, we find that *Black* does not alter our precedent. We agree with the Fourth Circuit that *Black* does not clearly overturn the objective test the majority of circuits applied to § 875(c). *Black* does not say that the true threats exception requires a subjective intent to threaten. Furthermore, our standard does require a finding of intent to communicate. The jury had to find Elonis "knowingly and willfully" transmitted a "communication containing . . . [a] threat to injure the person of another." 18 U.S.C. § 875(c). A threat is made "knowingly" as when it is "made intentionally and not [as] the result of mistake, coercion or duress." *Kosma*, 951 F.2d at 557 (quotation omitted). A threat is made willfully when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *Id.* (citation and emphasis omitted). This objective intent standard protects non-threatening speech while addressing the harm caused by true threats. Accordingly, the *Kosma* objective intent standard applies to this case and the District Court did not err in instructing the jury.

B.

Elonis contends the indictment was insufficient because it did not quote the language of the allegedly threatening statements. An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment is sufficient when it "(1) contains the elements of the offense intended to

be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Vitillo*, 490 F.3d 314, 321 (3d Cir. 2007) (internal quotations omitted). We have found an indictment is sufficient "where it informs the defendant of the statute he is charged with violating, lists the elements of a violation under the statute, and specifies the time period during which the violations occurred." *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 422 (2012).

In *Huet* we found an indictment for aiding and abetting a felon in possession of a firearm was sufficient because it alleged the previous felony conviction of the principal, the time period of the violation and the specific weapon involved, and alleged the defendant "knowingly aided and abetted Hall's possession of that firearm." *Id.* at 596. "No more was required to allow Huet to prepare her defense and invoke double jeopardy." *Id.*

The Eighth Circuit considered an indictment that did not include the verbatim contents of a letter, the date it was written, or the name of the author. *Keys v. United States*, 126 F.2d 181, 184-85 (8th Cir. 1942). The indictment for communicating a threat to injure with the intent to extort merely stated the letter threatened to harm the reputation of the victim with intent to extort. *Id.* at 182-83. Since the indictment summarized the contents of the letter, provided the date it was mailed and the name of the addressee, the Eighth Circuit found there could be no confusion as to

the elements and subject of the crime. *Id.* at 185 ("The fact that the defendant upon reading the indictment recognized the letter referred to and made no objection to the description at the time indicates the want of merit in his present criticism.").

To find a violation of 18 U.S.C. § 875(c) a defendant must transmit in interstate or foreign commerce a communication containing a threat to injure or kidnap a person. 18 U.S.C. § 875(c). Here the indictment on Count 2 stated:

> On or about November 6, 2010, through on or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant ANTHONY DOUGLAS ELONIS knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure and kill T.E., a person known to the grand jury. In violation of Title 18, United States Code, Section 875(c).

The indictment on the other counts was identical, but stated each date of the threat, the nature of the threat, and the subjects of the threat. Count 3 alleged "a threat to injure employees of the Pennsylvania State Police and the Berks County Sheriff's Department"; Count 4 alleged "a threat to injure a kindergarten class of elementary school children"; and Count 5 alleged "a threat to injure an agent of the Federal Bureau of Investigation." Elonis contends the indictment was deficient because they did not include the allegedly threatening statements.

The indictment was sufficient because the counts describe the elements of the violation, the nature of the threat, the subject of the threat, and the time period of the alleged violation. For example, Count Four alleged defendant communicated over the internet on November 16, 2010 "a threat to injure a kindergarten class." If Elonis had already been charged with this statement, the indictment provided enough information to challenge a subsequent prosecution. Based on the indictment, defendant was notified he needed to dispute that the statement was a threat, that he communicated the statement, and that he transmitted the statement through interstate commerce. Moreover, like the defendant in *Keys*, Elonis was able to identify which internet communications the indictment described, since he did not raise the issue until after trial.[9]

C.

Elonis contends there was insufficient evidence to convict on Counts 3 and 5 of the indictment because the statements on which they were based were not threats. "A claim of insufficiency of evidence places a very heavy burden on the appellant." *United States v. Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307,

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[9] Elonis did challenge the sufficiency of the indictment prior to trial, but only on constitutional grounds. The indictment did not include a subjective intent to threaten.

319 (1979) (emphasis omitted).

1.

Elonis contends Count 3 was based on a conditional statement, which he asserts cannot be a true threat. In *Watts* the Supreme Court found the conditional nature of defendant's statement to be one of the three factors demonstrating it was not a true threat. *Watts*, 394 U.S. at 708 ("Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."). Elonis posted the following on his Facebook page:

> Fold up your PFA and put it in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order
> That was improperly granted in the first place
> Me thinks the judge needs an education on true threat jurisprudence
> And prison time will add zeroes to my settlement
> Which you won't see a lick
> Because you suck dog dick in front of children
> ****
> And if worse comes to worse
> I've got enough explosives
> to take care of the state police and the sheriff's department
> [link: Freedom of Speech, www.wikipedia.org]

We considered the impact of conditional statements on the true threat analysis in *Kosma*, 951 F.2d at 554. We found that *Watts* did not hold conditional statements can never be true threats. *Id.* at 554 n.8 ("Even if Kosma's threats were truly

conditional, they could still be considered true threats."). We explained the conditional statements in *Watts* "were dependent on the defendant's induction into the armed forces—a condition which the defendant stated would never happen." *Id.* at 554. Because the defendant's threats in *Kosma* stated a precise time and place for carrying out the alleged threats, they were true threats. *Id.*

Here the District Court found that a reasonable jury could find the statement to be a true threat. *United States v. Elonis*, 897 F. Supp. 2d 335, 346 (E.D. Pa. 2012). Unlike in *Watts*, Elonis did not vow the condition precedent would never occur. However, this case is also unlike *Kosma*, where the statement included a particular time and place. Elonis's statement only conveys a vague timeline or condition. But, taken as a whole, a jury could have found defendant was threatening to use explosives on officers who "[t]ry to enforce an Order" of protection that was granted to his wife. Since there is no rule that a conditional statement cannot be a true threat—the words and context can demonstrate whether the statement was a serious expression of intent to harm—and we give substantial deference to a jury's verdict, there was not insufficient evidence for the jury to find the statement was a threat.

2.

Defendant contends that the statement on which Count 5 is based is a description of past conduct, not a future intent to harm:

> You know your shit's ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent Lady stood so close

Took all the strength I had not to turn the bitch ghost
Pull my knife, flick my wrist, and slit her throat
Leave her bleedin' from her jugular in the arms of her partner

[laughter]

So the next time you knock, you best be serving a warrant

And bring yo' SWAT and an explosives expert while you're at it
Cause little did y'all know, I was strapped wit' a bomb
Why do you think it took me so long to get dressed with no shoes on?

I was jus' waitin' for y'all to handcuff me and pat me down
Touch the detonator in my pocket and we're all goin'

[BOOM!]

A threat under § 875(c) is a communication "expressing an intent to inflict injury in the present or future." *United States v. Stock*, No. 12-2914, slip op. at 13 (3d Cir. Aug. 26, 2013). It was possible for a reasonable jury to conclude that the statement "the next time you knock, best be serving a warrant [a]nd bring yo' SWAT and an explosives expert" coupled with the past reference to a bomb was a threat to use explosives against the agents "the next time." Indeed, the phrase "the next time" refers to the future, not a past event. Accordingly, a reasonable jury could have found the statement was a true threat.

D.

Elonis contends the jury instruction stating communications that travel over the internet necessarily travel in interstate commerce violated his due process rights because the government was required to prove interstate transmission as an element of the crime. The District Court instructed the jury: "Because of the interstate nature of the Internet, if you find beyond a reasonable doubt that the defendant used the Internet in communicating a threat, then that communication traveled in interstate commerce." Trial Tr. 126, Oct. 11, 2011.

In *United States v. MacEwan* we explained the difference between interstate transmission and interstate commerce. 445 F.3d 237, 243-44 (3d Cir. 2006). The defendant in *MacEwan* con-tended the government failed to prove he received child pornography through interstate commerce because a Comcast witness testified it was impossible to know whether a particular transmission traveled through computer servers located entirely within Pennsylvania, or to any other server in the United States. *Id.* at 241-42. "[W]e conclude[d] that because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to [the] user, the data has traveled in interstate commerce." *Id.* at 244. "Having concluded that the Internet is an instrumentality and channel of inter-state commerce . . . . [i]t is sufficient that MacEwan downloaded those images from the Internet, a system that is inexorably inter-twined with interstate commerce." *Id.* at 245.

Elonis distinguishes *MacEwan* by stating that in that case the government presented evidence on how the internet worked. But the government's evidence in *MacEwan* did not show that any one of the defendant's internet transmissions traveled outside of Pennsylvania.[10] We found that fact to be irrelevant to the question of interstate commerce because submitting data on the internet necessarily means the data travels in interstate commerce. *Id.* at 241. Instead, we held "[i]t is sufficient that [the defendant] downloaded those images from the Internet." *Id.* at 245. Based on our conclusion that proving internet transmission alone is sufficient to prove transmission through interstate commerce, the District Court did not err in instructing the jury.

IV.

For the foregoing reasons we will uphold Elonis's convictions under 18 U.S.C. § 875(c).

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[10] Notably, the government did present testimony on how Facebook works. A computer forensic expert, Michael Moore, testified about privacy settings and that when a Facebook account is made public the postings can be seen by "whoever has access to it through the internet throughout the world." Trial Tr. 15-17, Oct. 17, 2011.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL
	:	ACTION
v.	:	
	:	NO. 11-13
ANTHONY DOUGLAS ELONIS	:	
	:	

MEMORANDUM

STENGEL, J. September 19, 2012

Anthony Elonis was convicted by a jury of four counts of violating 18 U.S.C. § 875(c) by posting threatening comments to the social networking website, Facebook. The jury acquitted on one count. The Defendant filed post-convictions motions, which I will deny.

I. Discussion

A. Rule 12(b)(3)(B)

Elonis asserts that the indictment, charging violations of § 875(c), was insufficient to state an offense because it did not include the specific threatening language posted on Facebook. The Government argues that filing a motion to dismiss the indictment well after the close of trial and verdict by the jury is grossly unfair to the prosecution because it allows the defense to "sandbag" the Government by withholding its motion to dismiss

until after jeopardy attaches.[1] The Government notes, correctly, the language in the indictment tracked the language of the statute, included the date and location of each violation, and stated the general content and identity of the target of the threat. Despite the patent untimeliness of the post-trial motions, I will consider it on the merits.[2]

Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure states that "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense."

An indictment is sufficient if it: "(1) contains the elements of the offense intended to be charged, (2)

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[1] The Court also notes the Government's objections to the timeliness of Defendant's motion as well after the fourteen (14) day time-limit imposed under the rules.

[2] For example, Count Two asserted:

> On or about November 6, 2010, through on or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant ANTHONY DOUGLAS ELONIS knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure and kill T.E., a person known to the grand jury. In violation of Title 18, United States Code, Section 875(c).

Similarly, Count Three alleged "a threat to injure employees of the Pennsylvania State Police and the Berks County Sheriffs Department" made on November 15, 2010; Count Four alleged "a threat to injure a kindergarten class of elementary school children" made on November 16, 2010; and Count Five alleged "a threat to injure an agent of the Federal Bureau of Investigation" made on November 30, 2010.

sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Rankin*, 870 F.2d 109, 112 (3d Cir. 1989). "No greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." *Id.* at 112. "Generally, an indictment will satisfy these requirements where it informs the defendant of the statute he is charged with violating, lists the elements of a violation under the statute, and specifies the time period during which the violations occurred." *Huet*, 665 F.3d 588, 2012 U.S. App. LEXIS 133, 2012 WL 19378, at *3 (citing *United States v. Urban*, 404 F.3d 754, 771 (3d Cir. 2005)).

The content required for an indictment is set forth in Rule 7 of the Federal Rules of Criminal Procedure. Rule 7(c)(1) says an indictment must "be a plain, concise, and definite written statement of the essential facts constituting the offense charged" and "must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." The purpose of Rule 7 was to abolish detailed pleading requirements and the technicalities previously required in criminal pleading. *See Huet*, 665 F.3d 588, 2012 U.S. App. LEXIS 133, 2012 WL 19378, at *3 (citing *United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007)); *see also United States v. Bergrin*, 650 F.3d 257, 264 (3d Cir. 2011) (same citation). "Although detailed allegations may have been

required under a common law pleading regime, they 'surely are not contemplated by [the Federal Rules].'" *Huet*, 665 F.3d 588, 2012 U.S. App. LEXIS 133, 2012 WL 19378, at *3 (quoting *Resendiz-Ponce*, 549 U.S. at 110).

Defendant is charged with violating 18 U.S.C. § 875(c), which criminalizes the "transmi[ssion] in interstate or foreign commerce [of] any communication containing any threat to kidnap any person or any threat to injure the person of another." "To prove a violation under this statute, the Government must prove that the defendant 'acted knowingly and willfully' in making the threatening communication and that the communication was 'reasonably perceived as threatening bodily injury.'" *United States v. Voneida*, 337 Fed.App'x 246, 247 (3d Cir. 2009) (quoting *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994)).

In *United States v. Kistler*, 558 F. Supp. 2d 655, 657 (W.D. Va. 2008), the court determined that the indictment was sufficient in almost identical circumstances. Specifically, in that case the defendant, Kistler, was charged with nine counts of transmitting in interstate commerce a communication containing a threat to injure the person of another, in violation of 18 U.S.C. § 875(c). The indictment returned against the defendant stated in its entirety: "The Grand Jury charges that: 1. On or about the following dates, in the Western District of Virginia and elsewhere, Christopher Jason Kistler transmitted in interstate commerce a communication containing a threat to injure the person of another, namely victims 'A' and 'B'." *Id.* at

656. The indictment went on to state each of the dates, which correlated with the victim and the charge.[3] *Id.* The defendant moved to dismiss the indictment on the ground that it failed to allege the elements of the crime charged. He argued that the indictment did not contain the specific words of the threats alleged and without those words, it contained an insufficient statement of the elements of the crime, since to be proscribed, the communication must contain a "true threat." *Id.*

The court denied the motion, stating "the indictment is sufficient, if barely. Whatever the rule at common law, the modern rule is that all of the words of a threat need not be set forth in the indictment." *Id.* (citing *Keys v. United States,* 126 F.2d 181, 184 (8th Cir. 1942) (holding that indictment charging attempt to extort money by threat to injure property or reputation was not defective because of its failure to set forth the alleged threatening letter, or its date or author)). The court went on to state that "[w]hile the indictment in the present case is bare bones, it narrowly passes constitutional muster, with its recitation of the dates of the communications and indication, at least by letter of alphabet, of the two victims." *Id. See also United States v. Ahmad,* 329 F. Supp. 292, 294–97 (M.D. Pa.1971) (holding that while it is not necessary to set forth in the indictment the threatening letters charged, it is not surplusage to do so); *Wilson v. United States,* 275 F. 307 (2d Cir. N.Y. 1921) (finding that the content of the letters in a conspiracy to defraud case were not required in the

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[3] For example, the table states Count One, 2/10/2007, Victim A.

indictment and holding that even if the content of the letter should have been described or set forth in the indictments, defendants raised the question too late and the defect was cured by the verdict).

Similarly, in *United States v. Musgrove*, 2011 U.S. Dist. LEXIS 107775 (E.D. Wis. Apr. 20, 2011), the court found that, despite defendant's objections to the contrary, the indictment returned by the grand jury was constitutional.[4] In challenging the sufficiency of the indictment, the defendant stated that it failed to include the alleged threat at issue and the alleged victim. *Id.* at 5. The court found that the language "appropriately tracks the language of the statute which states 'whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.'" *Id.* at 4–5 (quoting 18 U.S.C. § 875(c)). The court held that Seventh Circuit does not require that an indictment charging the defendant with criminal use of threatening language allege a "true threat" nor has it reversed a conviction for failure to include language defining what constitutes a "true threat" in an indictment. *Id.* at 11–12.

The indictment in this case alleges more than enough facts and certainly more than the cases

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[4] The indictment provided, "On or about January 14, 2011, in the State and Eastern District of Wisconsin, Michael L. Musgrove knowingly transmitted in interstate commerce a communication containing a threat to injure the person of another. All in violation of Title 18, United States Code, Section 875(c)."

discussed above. *See Kistler*, 558 F. Supp. 2d at 657. It states the nature of the threat, such as "to injure and kill" as well as the target of the threat and the date the threat was made. Therefore, the indictment tracks the statutory language of 18 U.S.C. § 875(c) as required and includes sufficient information to place the Defendant on notice of the offense. I will deny Defendant's motion as to the sufficiency of the indictment.

B. Fed. R. Crim. Pro. 33(a) and 34(b)

Elonis also requests a new trial under and arrest of judgment under Rules 33(a) and 34(b) of the Federal Rules of Criminal Procedure, respectively, claiming that the court incorrectly charged the jury on the element of "willfulness" of § 875(c). Under Rule 34, "[u]pon the defendant's motion or on its own, the court must arrest judgment if: (1) the indictment or information does not charge an offense; or (2) the court does not have jurisdiction of the charged offense." A motion to arrest judgment must be based on a defect on the face of the indictment, and not upon the evidence or its sufficiency. *United States v. Casile,* 2011 U.S. Dist. LEXIS 49437 at *10 (E.D. Pa. May 9, 2011) (Baylson, J.).

Under Rule 33(a), "[a] district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted." *United States v. Johnson,* 302 F.3d 139, 150 (3d Cir. 2002). Unlike a motion for insufficiency of the evidence under Rule 29, in which the court views the evidence in the light

most favorable to the Government, a Rule 33 motion permits the court to exercise its own judgment in assessing the Government's case. *United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003). The court "may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *United States v. Nissenbaum*, 2001 U.S. Dist. LEXIS 6039 at *2–*3 (E.D. Pa. May 8, 2001) (Waldman, J.). Additionally, the Third Circuit has emphasized that motions for a new trial based upon weight of the evidence are not favored and should only be granted sparingly in exceptional cases. *Government of the Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir.1987).

Elonis claims that, in order to overcome the protections of the First Amendment, "willfully" must be construed to mean that the Defendant intended to violate the law or act with a "bad purpose." Defendant relies on *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) for this proposition. In that case, Himelwright was charged with transmitting a wire communication with the intent to injure another, in violation of 18 U.S.C. § 875(c). The court found that the Government bore the burden of proving that Himelwright acted knowingly and willfully when he placed the threatening telephone calls, but the Government bore no burden of proving that Himelwright intended his calls to be threatening or that he had an ability at the time to carry out the threats. *Himelwright*, 42 F.3d at 782.

Section 875(c) is a general intent crime necessitating that the prosecution prove only that the act, i.e. the "statement," was performed knowingly

and intentionally.[5] It is not required that the defendant intend to make a threat.[6] The term "willfully" does not appear in the statute, the Government is correct that the language in *Himelwright* suggesting a requirement of willfulness is dicta and is not binding on this court or capable of

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[5] In my charge to the jury regarding the term intentionally, I instructed them that:

> A statement is made a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual. It is not necessary that the government prove that the defendant intended to carry out the threat or that he had the present ability to carry out the threat. This is called the objective "reasonable speaker" test.

In my charge to the jury regarding the term knowingly, I instructed them that:

> A person acts "knowingly" if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. The government is not required to prove that the defendant intended to carry out the threat. The intent required refers to an intent to make the communications in the first place.

[6] In my charge to the jury regarding willfully, I instructed them that:

> The Indictment uses the term knowingly and willfully. The word intentionally subsumes willfully. Therefore, the defendant need only have the intent to make the communications in the first place. The Government is not required to prove that the defendant himself intended for the statement to be a true threat. Whether a statement or communication on the Facebook posting constitutes a "true threat" is determined by the objective standard I described for you earlier.

changing the statutory language.

Under the direction of *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991), "[t]he objective, reasonable person test requires that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." This is known as the objective, reasonable speaker test. *See also, United States v. Elonis*, 2011 U.S. Dist. LEXIS 121401, 2011 WL 5024284, at *2 (E.D. Pa. Oct. 20, 2011) (quoting *Kosma*, 951 F.2d at 559). Another example of willfully as interpreted and applied in this Circuit is *United States v. Richards*, 415 F. Supp. 2d 547 (E.D. Pa. 2005), *rev'd on other grounds*, 271 Fed. Appx. 174 (3d Cir. 2008). In that case, the district court held: "[T]he phrase 'willfully' as used in § 879 requires only that the Government demonstrate, beyond a reasonable doubt, that 'a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of' Senator Clinton." 415 F. Supp. 2d at 558 (citing *Kosma*, 951 F.2d at 557).

In *United States v. Brahm*, 520 F. Supp. 2d 619, 629 (D.N.J. 2007), the court interpreted willfulness in the context of 18 U.S.C. § 1038(a)(1), stating that in *Kosma*, the Third Circuit interpreted the word "willfully" by describing the two prevailing views of the meaning of "willfully" as subjective and objective.

520 F. Supp. 2d at 629 (citing *Kosma*, 951 F.2d at 556). The objective standard, described by the court as a "reasonable" standard, required only that the defendant communicate a threat in a context where a reasonable person would recognize as a serious indication of intent. *Id.* (citing *Kosma*, 951 F.2d at 557). The court went on to say that the language used by the court in *Kosma* to define the "willful" standard for culpability is reminiscent of § 1038 and both statutes have similar purposes in protecting persons from harm resulting from threatening conduct or speech. 18 U.S.C. §§ 871, 1038.

None of the interpretations of "willfully" as first articulated in *Kosma* require that the Defendant must intend to violate a law. I find that the term willfully in the context of § 875(c) denotes only an act which is intentional, knowing, or voluntary and that a reasonable speaker would foresee the statement would be perceived as expressing a threat or an intent to do harm. *See United States v. Starnes*, 583 F.3d 196, 201 (3d Cir. 2009) (discussing the three levels of the interpretation of the term "willfully"). The term willfully does not appear in the statutory language and requiring the Defendant have the requisite state of mind suggested by the Defendant undermines the objective test emphasized by the Third Circuit.

Under these circumstances, the jury's verdict is consistent with the weight of the evidence. There is no danger that a miscarriage of justice has occurred.[7]

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[7] The Government put forth substantial evidence concerning the posts made by the Defendant on his Facebook account. The Government submitted testimony and evidence that Defendant's

The instructions to the jury regarding intentionally and willfully were not unconstitutionally "collapsed." Instead, following Third Circuit precedent, the willfulness requirement of the statute requires only that the defendant intentionally make a statement in a context wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm.

C. Jury Instruction Regarding Interstate Commerce

Elonis contends that a communication over the internet does not necessarily travel in interstate commerce. This is wrong. At trial I instructed the jury as follows:

> Because of the interstate nature of the Internet, if you find beyond a reasonable doubt that the defendant used the Internet in communicating a threat, then that communication traveled in interstate commerce. It does not matter whether the computer that the communication was transported to was in Pennsylvania, and it does not matter whether the communication was transmitted from within Pennsylvania. If the Internet was used in moving the communications, then it traveled in interstate commerce.

The Third Circuit has held that "because of the very

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estranged wife sought the Protection From Abuse Order, in part, because of the threats on Facebook, the Defendant was aware of this, and the Defendant continued to post the threatening comments. Additionally, there was testimony from co-workers' and Defendant's estranged wife that Defendant was aware of comments from "friends" on Facebook telling Defendant the comments were threatening or inappropriate.

interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce." *United States v. MacEwan,* 445 F.3d 237, 244 (3d Cir. 2006). The instruction given to the jury was not in error, as it was consistent with the Third Circuit law.

Finally, the Defendant did not object to the instruction at the time of trial. Defendant concedes that he did not object to the Court's instruction at trial and that review is therefore limited to plain error review. "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). Accordingly, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson v. United States,* 520 U.S. 461, 466–67 (1997) (quoting *United States v. Olano,* 507 U.S. 725, 732 (1993)).

The instruction that one's use of the Internet, standing alone, is enough to satisfy the interstate commerce element of § 875(c) was the correct statement of law. Additionally, even if the instruction was somehow in error, given the Third Circuit jurisprudence, as well as other courts' findings regarding transmission of information via the Internet, it was certainly not plain error. In *MacEwan,* 445 F.3d 237, the Third Circuit found that

"[b]ecause of fluctuations in the volume of Internet traffic and determinations by the systems as to what line constitutes the 'Shortest Path First,' a web site connection request can travel entirely intrastate or partially intrastate." *Id.* at 244. Ultimately, the court held that "the Internet is an instrumentality and channel of interstate commerce" and it "does not matter whether [defendant] downloaded the images from a server located within Pennsylvania or whether those images were transmitted across state lines. It is sufficient that [defendant] downloaded those images from the Internet, a system that is inexorably intertwined with interstate commerce." *Id.* at 245; *see also United States v. Schade,* Crim. A. No. 08-2388, 318 Fed. Appx. 91, 2009 U.S. App. LEXIS 6732, 2009 WL 808308, at *3 (3d Cir. Mar. 30, 2009) (reaffirming *MacEwan*). Other courts have similarly found that use of the Internet for transmission of images or messages satisfies the requirement of interstate commerce. *See, e.g., United States v. Carroll,* 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce."); *United States v. Lewis,* 554 F.3d 208, 214–16 (1st Cir. 2009) (holding one's use of the internet, "standing alone," is enough to satisfy a penal statute's "in interstate . . . commerce" element); *United States v. Runyan,* 290 F.3d 223, 239 (5th Cir. 2002) ("We join the First Circuit in holding that 'transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce' for the purposes of 18 U.S.C. § 2251"); *United States v.*

Tykarsky, 446 F.3d 458 (3d Cir. 2006) (citing *MacEwan* and holding that proof of transmission over the Internet, i.e. communicating with the putative minor via the Internet, regardless of whether the transmission crosses state lines is all that is required to satisfy the jurisdictional element of § 2422(b)); *United States v. Pomerico*, Crim. A. No. 06–113, 2008 U.S. Dist. LEXIS 77783, 2008 WL 4469465, at *3 (E.D.N.Y. Oct. 30, 2008) ("use of the Internet satisfies the interstate commerce element of [the child pornography statute], 18 U.S.C. § 2252A(a)(2)(B)."); *United States v. Fumo*, 2009 U.S. Dist. LEXIS 51581 (E.D. Pa. 2009) (same); *United States v. Gouin*, No. CR05-433RSL, 2008 U.S. Dist. LEXIS 33709, at *6–*7 (W.D. Wash. Apr. 24, 2008) (finding "compelling" the testimony of an expert witness about "why the use of the Internet to transmit the visual depictions at issue is inherently part of interstate commerce" and following *MacEwan*). Therefore, I will deny Defendant's motion as it pertains to the jury instructions regarding interstate commerce.

D. Rule 29(c)

Defendant argues that there was insufficient evidence to support a conviction on Counts Three and Five because, although offensive, his postings were not criminal. Specifically, Defendant argues that the words in Count Three are based on some future, unspecified and completely free-floating contingency: "And if worse comes to worse, I've got enough explosives to take care of the state police and sheriff's department." Defendant also argues Count Three is not directed at any Facebook friend and was a public posting, so it should have First Amendment

protection because it was broadcast to a large group of people.[8] Defendant further argues that Count Five similarly fails to state a true threat because the post concerns a monologue about an event that had already occurred as well as conditional statements and demands, but not threats.[9] Defendant argues that Count Five contains no threats to inflict injury. Additionally, Defendant cites *Watts v. United States*, 394 U.S. 705 (1969), to support his argument that the comments were not threats because they were made to a public audience and were conditional in nature.

Because a trial court must give deference to a jury's verdict, the convicted defendant carries "a very heavy burden" in bringing a motion under Rule 29. *United States v. Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995); *see also United States v. Rosario*, 118 F.3d 160, 162–63 (3d Cir. 1997). In evaluating a motion challenging the sufficiency of the evidence introduced

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[8] Defendant argues that because the post was public in order to view it a person would have to log on to Facebook, search for the Defendant's website and read on his Facebook page to find the specific post.

[9] The Facebook post referred to in Count Five states:

> You know your shit is ridiculous when you have the FBI knocking at the door. Little agent lady stood so close. Took all my strength I had not to turn the bitch ghost, pull my knife, flick my wrist, and slit her throat, leave her bleeding from her jugular in the arms of her partner. Laughter. So the next time you knock you best be serving a warrant and bring in a S.W.A.T. and an explosives expert while you are at it, because little did ya'll know I was strapped with a bomb. Why do you think it took me so long to get dressed with no shoes on? I was just waiting for ya'll to handcuff me and pat me down, touch the detonator in my pocket, and we're all going boom.

at trial, the court "must determine whether a reasonable jury believing the Government's evidence could find beyond a reasonable doubt that the Government proved all the elements of the offenses." *United States v. Salmon,* 944 F.2d 1106, 1113 (3d Cir. 1991); *see also United States v. Brodie,* 403 F.3d 123, 133 (3d Cir. 2005). Accordingly, the record is reviewed in the light most favorable to the Government. *United States v. Gibbs,* 190 F.3d 188, 197 (3d Cir. 1999). Additionally, a court may find that the Government introduced insufficient evidence to support a conviction only where "the prosecution's failure is clear." *United States v. Leon,* 739 F.2d 885, 891 (3d Cir. 1984) (quoting *Burks v. United States,* 437 U.S. 1, 17 (1978)).

To convict the Defendant of transmitting threats in interstate commerce, the Government was required to prove beyond a reasonable doubt that the Defendant made a true threat that was transmitted in interstate commerce. 18 U.S.C. § 875(c). In determining whether a true threat was made, the jury may consider factors such as the reaction of those who received the threat, whether the threat was conditional, whether the threat was communicated directly to its victim, the history of the relationship between the defendant and the victim, the context in which the threat was made, and whether the defendant makes an argument completely inconsistent with the evidence adduced at trial. *Kosma,* 951 F.2d at 554.

However, these are factors only, and a jury need not find all factors present to find a true threat was made. The Government presented evidence at trial

showing that the Berks County Sheriff's Department and the Pennsylvania State Police were aware of the Defendant's Facebook postings due to the Protection from Abuse Order obtained by the Defendant's estranged wife. The public nature of the comments meant only that the intended recipient named in the post would receive the message as well as put any other readers in reasonable fear of the Defendant's behavior.

Further, the evidence at trial showed the Defendant's threats were not conditional. A threat is not to be construed as conditional if it "had a reasonable tendency to create apprehension that its originator will act in accordance with its tenor." *United States v. Cox,* 957 F.2d 264, 266 (6th Cir. 1992). Defendant's wife sought a Protection from Abuse Order, in part, due to the threatening posts. After the FBI agent went to Defendant's house to discuss the posts, the Defendant made additional threatening posts. The evidence presented at trial showed other recipients, other than those directly mentioned in the threatening communications, were also fearful of the defendant's threats.

This evidence is sufficient to support a reasonable jury's finding of guilt in Counts Three and Five. Drawing all reasonable inferences in the Government's favor, I find that the evidence introduced at trial was sufficient to support the jury's verdict that the Defendant was guilty, beyond a reasonable doubt, of making "true threats" in Counts Three and Five. A reasonable person making the Facebook postings in question would surely foresee that the statement would be considered threatening

to its recipient. This was a question for the jury and the verdict was certainly supported by the evidence. Therefore, Defendant's motion for a judgment of acquittal will be denied.

I. Conclusion

For the reasons set forth above, I will deny Defendant's Post Trial Motions.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL
	:	ACTION
v.	:	
	:	NO. 11-13
ANTHONY DOUGLAS ELONIS	:	
	:	

MEMORANDUM

STENGEL, J. October 20, 2011

The defendant is charged with making threatening communications for comments posted to the social networking website, Facebook. It is a federal crime to transmit in interstate commerce a communication containing a threat to injure another person. Mr. Elonis' motion to dismiss the indictment raises constitutional challenges to the criminal charges and to the statute. For the reasons set forth below, I will deny the defendant's motion to dismiss.

I. Background

Mr. Elonis was employed as a supervisor in the operations department at Dorney Park and Wildwater Kingdom, an amusement park in Allentown, Pennsylvania. He was fired on October 17, 2010. After his termination, Mr. Elonis began posting statements on his Facebook page suggesting he would do damage to Dorney Park, that he had enough

explosives to harm the Pennsylvania State Police and the Berks County Sheriff's Department, and do violence to a kindergarten class. Additionally, Mr. Elonis posted threatening comments concerning his wife.[1] Mr. Elonis was arrested on December 8, 2010, and charged in a criminal complaint with transmitting in interstate commerce a communication containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c).[2]

On January 7, 2011, the grand jury returned a five-count indictment charging Mr. Elonis with making threatening communications (1) to patrons and employees of Dorney Park and Wildwater Kingdom, (2) to his wife, (3) to employees of the Pennsylvania State Police and Berks County Sheriff's Department, (4) to a kindergarten class, and (5) to an FBI agent.

II. Discussion

An indictment must allege sufficient facts to establish the legal requirements of the crimes charged. *See United States v. Cefaratti,* 221 F.3d 502, 507 (3d Cir. 2000). "In order to be valid, an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the

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[1] Mr. Elonis' wife subsequently obtained a Protection from Abuse Order (PFA) for herself and the couple's two children based in part on the threats in these comments.

[2] The statute under which the defendant is charged, 18 U.S.C. § 875(c), provides: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."

law that he or she is charged with violating." *United States v. Hedaithy*, 392 F.3d 580, 589 (3d Cir. 2004) (citing *United States v. Zauber*, 857 F.2d 137, 144 (3d Cir. 1988)). Dismissal of an indictment is an "extreme remedy," reserved only for the most egregious abuses of the criminal process. *United States v. Fisher*, 692 F. Supp. 495, 501 (E.D. Pa. 1988) (quoting *United States v. Birdman*, 602 F.2d 547, 559 (3d Cir. 1979)).

Mr. Elonis contends that his Facebook postings are protected speech under the First Amendment and, therefore, cannot be criminal. I recognize that "the bedrock principle underlying the First Amendment ... is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). It is also well-established that there are certain categories of speech that are not protected under the First Amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). One of these categories is speech which is a "true threat." *See Watts v. United States*, 394 U.S. 705, 708 (1969).

A. Whether Mr. Elonis' Facebook Postings Communicate True Threats is a Question of Fact

In *United States v. Kosma*, 951 F.2d 549, 558 (3d Cir. 1991) the Third Circuit interpreted 18 U.S.C. § 871, a statute regarding threats on the President and containing very similar language to 18 U.S.C. § 875(c). The Third Circuit held that the "intent" required with respect to threatening speech means the government must prove the defendant intentionally made the communication, not that he intended to make a threat. This intent requirement is

limited to the defendant's state of mind when he made the statement or the communications. In this case, the "intent" element is satisfied if the government proves the defendant intended to make the posts on Facebook.

If the government proves the defendant intended to make the statement, i.e., the Facebook posting in question, the inquiry then becomes whether the statement is a true threat. If it is not a true threat, the statement is protected by the First Amendment and there can be no criminal liability. If the statement contains a true threat, it is not protected by the First Amendment and the defendant could be found guilty of communicating a threat under § 875.

Whether the Facebook postings contain true threats is a question of fact for the jury and cannot be decided by the court on a motion to dismiss.[3] What standard the jury should apply to decide if the postings contain a true threat is an interesting question.[4] There seems to be general agreement that

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[3] *See United States v. Voneida*, 337 Fed. Appx. 246, 249 (3d Cir. 2009) (citing *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994)) (stating whether a statement is a "true threat" under 18 U.S.C.S. § 875(c) is a question best left to a jury). Courts in other jurisdictions have concluded that "whether words used are a 'true threat' is generally best left to the triers of fact." *See United States v. Carrier*, 672 F.2d 300 (2d Cir.1982).

[4] In *Virginia v. Black*, the United States Supreme Court commented on whether courts can still use an objective test to determine whether speech constitutes a "true threat." The Court described "true threats" as

> those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of

the court should instruct the jury on an objective test. Some courts apply an objective test that focuses on the reaction of the "reasonable recipient" to the statements. Others focus on the "reasonable speaker" and what he or she might anticipate would be the reaction to the communications.[5] The Third Circuit

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> individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur. Intimidation in the constitutionally prescribed sense of the word is a type of true threat, where a speaker directs a threat to a person or group of person with the intent of placing the victim in fear of bodily harm or death.

538 U.S. 343, 359–60 (2003). A plurality of the Court, however, held that a jury instruction stating that the act of burning a cross was prima facie evidence of an intent to intimidate was unconstitutional, because it did not differentiate between constitutionally protected speech and unprotected speech. *Id.* at 3.

Courts after *Virginia v. Black* are divided as to whether *Black* replaces the objective test with a subjective test. For example, the Ninth Circuit has adopted a subjective test. *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir.2005). The *Cassel* court stated that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* Other courts have read *Black* as consistent with an objective test and continued to use their previous standard.

[5] All Circuits, other than the Ninth Circuit, apply an objective test. However, these courts are split as to whether the focus of the reasonable person should be on the speaker or the recipient. While each of these "tests" focuses differently, they can both be viewed as "objective" tests. For instance, the Eighth Circuit, among others, adopted a "reasonable listener" test, holding that a "court must analyze an alleged threat in the light of its entire factual context, and decide whether the recipient of

in *Kosma* clearly adopted the "reasonable speaker" test:

> The objective, reasonable person test requires that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm.

Id. at 559. In considering whether a communication is a true threat all circuits seem to agree the jury should "consider context, including the effect of an allegedly threatening statement on the listener." *See*

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the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *See United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996).

The Third Circuit, among others, adopted a "reasonable speaker" test, holding that a true threat exists when the "defendant intentionally make[s] a statement ... in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the [target]." *United States v. Kosma*, 951 F.2d 546, 553–54 (3d Cir. 1991). Even among Third Circuit decisions, there are some apparent inconsistencies regarding the "reasonable speaker" standard. See *United States v. D'Amario*, 330 Fed. Appx. 409, 414 (3d Cir. 2009) (nonprecedential) (quoting *Kosma*'s "reasonable speaker" language and mischaracterizing it as a "reasonable recipient" standard); *United States v. Zavrel*, 384 F.3d 130, 136 (3d Cir. 2004) (stating, in dicta, that the "reasonable recipient" test should be used in interpreting "true threat" under 18 U.S.C. § 876). However, *Kosma*'s "reasonable speaker" test remains the binding precedent.

Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1074–75 n.7 (9th Cir. 2002); *see also United States v. Kosma*, 951 F.2d at 553–54 (alleged threats must be analyzed in context).

The defendant argues the communications alleged to be threats in the indictment do not constitute "true threats," and are, in fact, protected speech under the First Amendment. Mr. Elonis contends that the Government did not show he had any subjective intent that the posts be understood as threats, that any third parties felt threatened by the posts, or that the posts provoked any third party listeners/readers. (Doc. # 24 at 12.) Mr. Elonis states these posts are simply crude, spontaneous and emotional language expressing frustration, and that they were not sufficiently definite to constitute a true threat. *Id.* at 7. The Government contends Elonis' group of Facebook "friends" included those persons whom he unambiguously threatened, including his wife and former co-workers at Dorney Park. Further, the Government argues that a reasonable person could see Mr. Elonis' posts as threats and, in fact, did.[6]

A reasonable jury could find Mr. Elonis' posts constituted true threats by applying the objective speaker test. For example, on November 15, 2010 Mr. Elonis posted:

> And if worse comes to worse I've got enough explosives to take care of the State Police and the Sheriff's Department.

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[6] At least three people, co-workers and friends of Mr. Elonis, will testify regarding their troubled reactions to Mr. Elonis' Facebook posts. (Doc. # 33 at 10–11.)

The next day, on November 16, 2010 Mr. Elonis posted:

> That's it, I've had about enough I'm checking out and making a name for myself Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined And hell hath no fury like a crazy man in a Kindergarten class The only question is . . . which one?

Additionally, Mr. Elonis' wife was granted a PFA Order due to the threatening posts targeting her, which, even after the PFA was granted, Mr. Elonis continued to make.[7] Therefore, whether the posts by defendant constitute threats within the proscription of 18 U.S.C. § 875(c) may not be decided as a matter of law at this stage of this case.[8] The defendant's intentions when posting the content, the reasonable expectation as to the effect of the posts on a recipient, and the circumstances surrounding the posts present issues of fact.

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[7] See Mr. Elonis' post regarding his wife on or about November 15, 2010, which states "Fold up your PFA and put it in your pocket[.] Is it thick enough to stop a bullet?" (Doc. # 1 at 5.)

[8] *See United States v. Fulmer*, 108 F.3d 1486, 1490, 1492 (1st Cir. 1997) (voicemail message to Federal agent that "the silver bullets are coming. . . . Enjoy the intriguing unraveling of what I said to you" was, given defendant's history of threats against the agent, reasonably understood as a "true threat" under 18 U.S.C. § 875[c]) and *United States v. Voneida*, 337 Fed. Appx. 246, 247 (3d Cir. Pa. 2009) (holding that statements, including one that defendant posted he would make the Virginia Tech shooting incident look like "a trip to an amusement park," demonstrated a serious intention to inflict bodily harm and could be viewed as a threat).

B. 18 U.S.C. § 875(c) is Constitutional

Mr. Elonis argues that 18 U.S.C. § 875(c) is overly broad and unconstitutionally vague. Specifically he contends: (1) § 875(c) covers a substantial amount of protected speech and (2) the statute fails to provide a person with a reasonable opportunity to know what speech is disallowed and what is not.[9] Courts review these contentions applying a presumption of constitutionality to the challenged statute. *Marshall v. Lauriault*, 372 F.3d 175, 185 (3d Cir. 2004) (citing *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983)).

i. The Statute is Not Overly Broad

The defendant asserts that § 875(c) is overly broad since, absent a requirement of subjective intent, it permits conviction for a substantial amount of protected speech. To support his claim, the defendant points to a variety of communications that he contends are protected under the First Amendment, but would subject the speaker to criminal prosecution under the statute, including the following:

- President Bush's comments in a national address in March 2003 that the United States would commence bombing Iraq within 48 hours if Saddam Hussein did not surrender and leave the country.

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[9] The elements of § 875(c), as construed by the Third Circuit, are that the defendant said or transmitted a communication in interstate commerce; that the communication contained a threat to injure another person. To prove a violation under this statute, the Government must prove that the defendant "acted knowingly and willfully" in making the threatening communication. See *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994).

- President Obama's comments to the members of a musical group that his daughters were huge fans, "but, boys, don't be getting any ideas. I have two words for you: predator drones."

- Samuel L. Jackson's role in the 1994 film Pulp Fiction where he plays a hitman who recites a passage from the Book of Ezekiel 25:17 prior to murdering each of his victims.

The defendant contends that by defining "true threats" as "where the speaker means to communicate a serious expression of intent to commit an unlawful act of violence," the Supreme Court held that a requirement of subjective intent to threaten is a precondition to a finding of constitutionality. However, many courts have held that this language of the Supreme Court is more appropriately interpreted as stating that there must be an intentional, i.e., knowing, communication of what is an objectively serious threat. Therefore, proof of subjective intent to actually do harm is not required. So long as the defendant knowingly made the statement, whether it was a threat is determined by an objective reasonable speaker standard. *See United States v. Kosma,* 951 F.2d at 553–54 (3d Cir. 1991). Moreover, an objective interpretation does not sweep too broadly, and would not incorporate the "protected speech" envisioned in the defendant's motion because the statute criminalizes only "true threats." *See United States v. Francis,* 164 F.3d 120, 122–23 (2d Cir. 1999) (finding the statute constitutional, as it criminalizes only true threats even though there is no requirement that the Government prove that the defendant intended to carry out his threats).

ii. The Statute is Not Impermissibly Vague

The defendant also contends that the statute is impermissibly vague. The essence of this challenge is that § 875(c) does not define what is meant by a "threat;" and, that it therefore "fails to provide a person with a reasonable opportunity to know what speech is disallowed and what is not."[10] (Doc. # 24 at 28).

To survive vagueness review, a statute must (1) define the offense with sufficient definiteness that a person of ordinary intelligence can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a nonarbitrary, nondiscriminatory manner. *United States v. Mariano,* 2006 U.S. Dist. LEXIS 7497 at *9 (E.D. Pa. Feb. 27, 2006) (citing *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999)).

The defendant's argument is without merit. The examples of "convictions upheld under 18 U.S.C. § 875(c) are innumerable." *See United States v. Vaksman,* 2009 U.S. Dist. LEXIS 119287 at *11 (E.D. Wash. Dec. 4, 2009). Defendant's claim that the statute does not define "threat" and the case law provides the only interpretations of "threat" is misleading. Courts may legitimately look to

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[10] Even considering the general intent requirement ("knowingly"), as compared to a specific intent requirement ("willfully"), an ordinary citizen can understand what is meant by the terms "transmit," "threat to kidnap," and "threat to injure the person of another" and the statute easily provides sufficient standards to allow enforcement in a non-arbitrary manner. *United States v. Tiller,* 2008 U.S. Dist. LEXIS 85243 at *3 (W.D. La. Oct. 21, 2008).

interpretations in case law when determining whether a statute is unconstitutionally vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 109–10 (1972).

I find that § 875(c) is not unconstitutional either due to overbreadth or vagueness. The term, "threat to injure the person of another" is commonly understood. Every court to consider the issue has so held.[11] By construing the statute to apply only to "true threats," the Courts have limited its application so that it captures only speech that is unprotected under the First Amendment.

IV. Conclusion

For the reasons set forth in this memorandum defendant's Motion to Dismiss the Indictment (Doc. # 24) is denied.

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[11] *See, e.g.*, *United States v. Sutcliffe*, 505 F.3d 944, 953–54 (9th Cir. 2007) ("[W]e are convinced that the statute is not impermissibly vague. An ordinary citizen can understand what is meant by the terms 'threat to kidnap' and 'threat to injure,' and we are persuaded that the statute provides sufficient standards to allow enforcement in a non-arbitrary manner."); *United States v. Tiller*, No. 07–50067, 2008 U.S. Dist. LEXIS 85243, 2010 WL 4690511 at *1 (W.D. La. Oct. 21, 2008) ("Even considering the general intent requirement ... an ordinary citizen can understand what is meant by the terms 'transmit,' 'threat to kidnap,' and 'threat to injure the person of another,' and the statute easily provides sufficient standards to allow enforcement in a non-arbitrary manner.").

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3798

UNITED STATES OF AMERICA

v.

ANTHONY DOUGLAS ELONIS,
Appellant

(D.C. Crim. No. 5-11-cr-00013-001)

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, ALDISERT* and SCIRICA*, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

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* As to panel rehearing only.

regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: October 17, 2013
DWB/cc:

Robert A. Zauzmer, Esq.
Sherri A. Stephan, Esq.
Ronald H. Levine, Esq.
Anthony Douglas Elonis
Abraham J. Rein, Esq.

Whitest Kids U Know: It's Illegal to Say...
(*available at* http://www.youtube.com/watch?v=QEQOvyGbBtY)

Hi, I'm Trevor Moore.
Did you know that it's illegal to say I want to kill the President of the United States of America?
It's illegal.
It's a federal offense.
It's one of the only sentences that you're not allowed to say.
Now it was okay for me to say it right then because I was just telling you that it's illegal to say I want to kill the President of the United States of America.
I'm not actually saying it.
I'm just letting you know that it's illegal to say that.
It's kind of like a public service.
I'm letting you know so that you don't accidentally go out and say something like that.
Um, but what's interesting is that it's very illegal to say I really really think someone out there should kill the President of the United States of America.
That's illegal. Extremely illegal.
Very, very illegal.
But not illegal to say with a mortar launcher.
Because that's its own sentence.
It's an incomplete sentence but it may have nothing to do with the sentence before that. So, that's perfectly fine.
Perfectly legal.
I also found out that it's incredibly illegal, extremely illegal, to go on television and say something like the best place to fire a mortar launcher at the White

House would be from the roof of the Rockefeller-Hewitt Building, because of minimal security and you'd have a clear line of sight to the President's bedroom.
Insanely illegal.
Ridiculously, recklessly, insanely illegal. Yet even more illegal to show an illustrated diagram.
[Diagram of Rockefeller-Hewitt Building, White House, and potential path of mortar flashes on screen]
Insanely illegal.
Ridiculously, horribly felonious.
Because they will come to your house in the middle of the night and they will lock you up.
Extremely against the law.
Uh, one thing that is technically legal to say is that we have a group that meets Fridays at midnight under the Brooklyn Bridge and the password is sic semper tyrannis.

OPPOSITION BRIEF

No. 13-983

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
DAVID A. O'NEIL
Acting Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a conviction for transmitting in interstate or foreign commerce "any threat to injure the person of another," in violation of 18 U.S.C. 875(c), requires proof that the defendant subjectively intended his communication to be threatening.

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In the Supreme Court of the United States

No. 13-983

ANTHONY DOUGLAS ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 730 F.3d 321. The opinion of the district court denying petitioner's post-trial motions (Pet. App. 30a-48a) is reported at 897 F. Supp. 2d 335. The opinion of the district court denying petitioner's motion to dismiss (Pet. App. 49a-60a) is unreported, and is available at 2011 WL 5024284.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2013. A petition for rehearing was denied on October 17, 2013 (Pet. App. 61a-62a). On January 6, 2014, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 14, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of transmitting in interstate commerce a "threat to injure the person of another," in violation of 18 U.S.C. 875(c).[1] Pet. App. 11a. The district court sentenced him to 44 months of imprisonment to be followed by three years of supervised release. *Id.* at 10a. The court of appeals affirmed. *Id.* at 1a-29a.

1. In May 2010, after his wife moved out of their home with their two young children, petitioner began exhibiting troubling behavior at his workplace, the Dorney Park and Wildwater Kingdom amusement park. Pet. App. 3a. Supervisors sent petitioner home several times after observing petitioner crying with his head down on his desk. *Ibid.* One of the female employees petitioner supervised filed five sexual-harassment complaints against petitioner, including one that alleged petitioner started to undress in front of her at work. *Ibid.* On October 17, 2010, petitioner posted on his Facebook page a photograph taken for the Dorney Park Halloween Haunt; the photograph showed petitioner in costume holding a knife to that woman's neck and petitioner added the caption "I wish" under the photograph. *Ibid.* Petitioner was fired the same day. *Ibid.*

---

[1] Section 875(c) provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. 875(c).

Two days after he was fired, petitioner posted additional violent statements on his Facebook page. Pet. App. 3a. In one posting about his former employer, petitioner stated:

> Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

Id. at 3a-4a.[2]

Petitioner also posted statements about his estranged wife. Pet. App. 4a-7a. In one post, he stated: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder." *Id.* at 4a. In response to a posting from petitioner's wife's sister about shopping for Halloween costumes with petitioner's children, petitioner wrote: "Tell [petitioner's son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [petitioner's wife's] head on a stick?" *Ibid.* In October 2010, petitioner posted the following on his Facebook page:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little

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[2] The October 19, 2010 posting about Dorney Park and Wildwater Kindgom was the basis of Count 1 of the indictment, a charge on which petitioner was acquitted. Indictment 1; J. 1.

> cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.

Ibid.

On November 4, 2010, based on petitioner's Facebook comments, a state court granted petitioner's wife a protection-from-abuse order against petitioner. Pet. App. 4a. Petitioner then posted several additional statements on Facebook expressing an intent to harm his wife. On November 7, petitioner posted the following:

> Did you know that it's illegal for me to say I want to kill my wife?
>
> It's illegal.
>
> It's indirect criminal contempt.
>
> It's one of the only sentences that I'm not allowed to say.
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.
>
> I'm not actually saying it.
>
> I'm just letting you know that it's illegal for me to say that.
>
> It's kind of like a public service.
>
> I'm letting you know so that you don't accidently go out and say something like that

Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.

Perfectly legal.

I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal. Yet even more illegal to show an illustrated diagram.

===[__]=====house

::::::::::::::: ^ ::cornfield

::

::

::

####################[#]getaway road

Insanely illegal.

Ridiculously, horribly felonious.

> Cause they will come to my house in the middle of the night and they will lock me up.
>
> Extremely against the law.
>
> Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

Id. at 5a-6a. That statement was one of the bases for Count 2 of the indictment, which charged unlawful threats against petitioner's wife, in violation of 18 U.S.C. 875(c). Indictment 2. Petitioner was convicted on that charge. Pet. App. 10a. Petitioner's wife testified at trial that she took these statements seriously, stating: "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives." *Id.* at 6a (quoting 10/19/11 Trial Tr. 97).

Petitioner continued to post violent messages. On November 15, 2010, petitioner posted the following on his Facebook page:

> Fold up your PFA [protection-from-abuse order] and put it in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> That was improperly granted in the first place
>
> Me thinks the judge needs an education on true threat jurisprudence
>
> And prison time will add zeroes to my settlement
>
> Which you won't see a lick
>
> Because you suck dog dick in front of children
>
> ****

> And if worse comes to worse
>
> I've got enough explosives
>
> to take care of the state police and the sheriff's department
>
> [link: Freedom of Speech, www.wikipedia.org]

Pet. App. 7a. That statement was a basis for Count 2 of the indictment, which charged unlawful threats against petitioner's wife, in violation of 18 U.S.C. 875(c), and for Count 3, which charged unlawful threats to local law enforcement, in violation of 18 U.S.C. 875(c). Indictment 2-3. Petitioner was convicted on both counts. Pet. App. 10a.

On November 16, petitioner posted the following on his Facebook page:

> That's it, I've had about enough
>
> I'm checking out and making a name for myself
>
> Enough elementary schools in a ten mile radius
>
> to initiate the most heinous school shooting ever
>
> imagined
>
> And hell hath no fury like a crazy man in a
>
> kindergarten class
>
> The only question is . . . which one?

Pet. App. 7a. That posting was the basis for Count 4 of the indictment, which charged unlawful threats against elementary school children, in violation of 18 U.S.C. 875(c). Indictment 4. Petitioner was convicted on that count. Pet. App. 10a.

At that point, Federal Bureau of Investigation (FBI) Agent Denise Stevens was monitoring petitioner's public Facebook postings. Pet. App. 7a. Based on

petitioner's postings, Agent Stevens and another FBI agent went to petitioner's house to interview him. *Id.* at 8a. When the agents knocked on his door, petitioner's father answered and told the agents that petitioner was sleeping. *Ibid.* After several minutes, petitioner came to the door wearing a t-shirt and jeans, but no shoes. *Ibid.* Petitioner asked the agents if they were law enforcement officers and asked if he was free to go. *Ibid.* After the agents identified themselves and told petitioner he was free to go, petitioner went inside and closed the door. *Ibid.* Later that day, petitioner posted the following on his Facebook page:

> You know your shit's ridiculous
>
> when you have the FBI knockin' at yo door
>
> Little Agent Lady stood so close
>
> Took all the strength I had not to turn the bitch ghost
>
> Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?

> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all goin'
>
> [BOOM!]

Id. at 8a-9a. Those statements were the basis for Count 5 of the indictment, which charged unlawful threats against an FBI agent, in violation of 18 U.S.C. 875(c). Indictment 5. Petitioner was convicted on that count. Pet. App. 10a.

2. On December 8, 2010, petitioner was arrested and charged in a five-count indictment with transmitting in interstate commerce communications containing threats to injure another person, in violation of 18 U.S.C. 875(c). Pet. App. 9a.

Petitioner filed a motion to dismiss the indictment. Pet. App. 9a. He argued that this Court held in *Virginia* v. *Black*, 538 U.S. 343, 347-348 (2003), that statements such as his are protected speech (rather than "true threat[s]") under the First Amendment in the absence of proof that he had a subjective intent to threaten. Pet. App. 9a. The district court denied petitioner's motion. *Id.* at 49a-60a. The court noted that the Third Circuit applies an "objective speaker test," under which a communication is a true threat (and therefore not protected by the First Amendment) if a defendant intentionally made the statement and a reasonable person would foresee that such a statement would be interpreted by those to whom the speaker communicates the statement as a serious expression of an intention to inflict bodily harm. *Id.* at 53a-55a (citing *United States* v. *Kosma*, 951 F.2d 549 (3d Cir. 1991)). The district court concluded that a

reasonable jury could find that petitioner's posts constitute true threats and declined to dismiss the indictment. *Id.* at 55a-56a; see *id.* at 9a-10a.

At trial, petitioner asked the district court to instruct the jury that "the government must prove that he intended to communicate a true threat, rather than some other communication." C.A. App. 45 (emphasis omitted). Instead, the district court's jury instruction included the following:

> To constitute a true threat, the statement must communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. This is distinguished from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger.
>
> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

Id. at 546-547. The jury convicted petitioner on Counts 2 through 5. Pet. App. 10a.

Petitioner filed a post-trial motion to dismiss the indictment, for a new trial, and to arrest judgment. See Pet. App. 10a. The district court denied the motion. *Id.* at 30a-48a. The district court sentenced petitioner to 44 months of imprisonment to be followed by three years of supervised release. *Id.* at 10a.

3. The court of appeals affirmed, rejecting petitioner's arguments that the district court erred in refusing to instruct the jury that it must find that petitioner subjectively intended to threaten harm, that the evidence was insufficient to establish a violation of Section 875(c), and that the indictment was invalid because it did not quote the language of the charged threats. Pet. App. 1a-29a.[3]

Relying on circuit precedent, the court of appeals held that the district court correctly declined to give petitioner's proposed subjective-intent jury instruction and instead instructed the jury to apply an objective reasonable-person standard. Pet. App. 11a-21a. The court explained that the First Amendment permits criminal punishment for a communication that qualifies as a "true threat." *Id.* at 11a-13a. The court noted that the "prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 16a (brackets in original) (quoting *Black*, 538 U.S. at 360) (internal quotation marks omitted). The court also explained that applying a reasonable-person standard to assess whether a communication qualifies as a true threat "winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made." *Id.* at 20a (quoting *United States* v. *Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), cert. denied, 134 S. Ct. 59 (2013)).

The court of appeals rejected petitioner's argument that this Court's decision in *Black*, *supra*, requires

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[3] Petitioner does not renew his sufficiency challenge or his challenge to the indictment in his petition for a writ of certiorari.

courts to employ a subjective-intent test in determining whether a communication qualifies as a true threat under the First Amendment. Pet. App. 13a-21a. The court of appeals noted that this Court in *Black* had no occasion to consider whether a true threat requires a subjective intent to threaten because the statute at issue in that case (which criminalized cross-burning with the intent of intimidating) "already required a subjective intent to intimidate." *Id.* at 15a; see *id.* at 13a. The court of appeals stated that petitioner's interpretation of the holding in *Black* "is inconsistent with the logic animating the true threats exception." *Id.* at 16a. "The majority of circuits that have considered this question," the court explained, "have not found [this Court's] decision in *Black* to require a subjective intent to threaten." *Id.* at 17a-18a (citing cases). The court of appeals acknowledged and expressed disagreement with the Ninth Circuit's contrary conclusion in *United States* v. *Cassel*, 408 F.3d 622 (2005). Pet. App. 20a-21a.

ARGUMENT

Petitioner contends (Pet. 25-32) that his conviction for transmitting a threatening communication in violation of 18 U.S.C. 875(c) must be reversed because the district court did not instruct the jury that it must find that petitioner subjectively intended to threaten his wife, local law enforcement, elementary school children, or an FBI agent. He argues that such an instruction is required under the First Amendment, as construed in *Virginia* v. *Black*, 538 U.S. 343 (2003). That question does not merit review because the district court correctly instructed the jury that it should determine whether petitioner's communication constituted a true threat under an objective "reasonable

person" standard. Although some disagreement exists among the courts of appeals on the question whether proof of a true threat requires proof of a subjective intent to threaten, review of that question is not warranted because the circuit split is shallow and may resolve itself without this Court's intervention. This Court has repeatedly and recently denied petitions for a writ of certiorari raising the same issue. See, *e.g.*, *Jeffries* v. *United States*, 134 S. Ct. 59 (2013) (No. 12-1185); *Williams* v. *United States*, 133 S. Ct. 1516 (2013) (No. 12-7504); *Mabie* v. *United States*, 133 S. Ct. 107 (2012) (No. 11-9770); *Parr* v. *United States*, 556 U.S. 1181 (2009) (No. 08-757); *Stewart* v. *United States*, 546 U.S. 980 (2005) (No. 05-5541). The same result is appropriate here.[4]

1. Section 875(c) of Title 18 of the United States Code makes it unlawful to "transmit[] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." Because that section targets communication, it "must be interpreted with the commands of the First Amendment clearly in mind." *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). Accordingly, like other statutes that target threatening communications, Section 875(c) reaches only "true 'threat[s],'" rather than "political hyperbole" or "vehement," "caustic," or "unpleasantly sharp attacks" that fall short of true threats. *Id.* at 708. As the Court has explained, true threats are proscribable because they are "outside the First Amendment," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992),

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[4] Another petition for a writ of certiorari that presents the same question is currently pending. *Martinez* v. *United States*, No. 13-8837 (filed Feb. 21, 2014).

including when the speaker does "not actually intend to carry out the threat," *Black*, 538 U.S. at 360.

Petitioner's argument that proof of subjective intent is required by the First Amendment lacks merit. A large majority of the courts of appeals have rejected First Amendment challenges to Section 875(c) and comparable federal statutes prohibiting the making of various types of threats, holding that the statutes at issue prohibit "true threats" and do not require proof that a defendant specifically (and subjectively) intended for the communications at issue to be taken as threats. See, *e.g.*, *United States* v. *Clemens*, 738 F.3d 1, 2-3 (1st Cir. 2013) (18 U.S.C. 875(c)); *United States* v. *Francis*, 164 F.3d 120, 122-123 (2d Cir. 1999) (same); Pet. App. 11a-21a (same); *United States* v. *White*, 670 F.3d 498, 506-512 (4th Cir. 2012) (same); *United States* v. *Myers*, 104 F.3d 76, 80-81 (5th Cir.) (same), cert. denied, 520 U.S. 1218 (1997); *United States* v. *Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (same), cert. denied, 134 S. Ct. 59 (2013); *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir.) (same), cert. denied, 546 U.S. 980 (2005); *United States* v. *Mabie*, 663 F.3d 322, 332-333 (8th Cir. 2011) (same), cert. denied, 133 S. Ct. 107 (2012); *United States* v. *Viefhaus*, 168 F.3d 392, 395-396 (10th Cir.) (18 U.S.C. 844(e)), cert. denied, 527 U.S. 1040 (1999); *United States* v. *Alaboud*, 347 F.3d 1293, 1296-1298 (11th Cir. 2003) (18 U.S.C. 875(c)).

That view is correct. The jury instructions here already screened out statements that constituted "idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger." C.A. App. 547. The statements that qualify as true threats thus have a significant, serious character.

Requiring proof of a subjective intent to threaten would undermine one of the central purposes of prohibiting threats. As this Court has noted, in addition to protecting persons from the possibility that threatened violence will occur, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders." *R.A.V.*, 505 U.S. at 388; see *Black*, 538 U.S. at 360 (quoting same); Pet. App. 16a (quoting *Black* and *R.A.V.*). A statement that a reasonable person would regard as a true threat creates such fear and disruption, regardless of whether the speaker subjectively intended the statement to be innocuous. Cf. *United States* v. *Castagana*, 604 F.3d 1160, 1164 (9th Cir. 2010) ("Even if a perpetrator does not intend that his false information be believed as indicative of terrorist activity, the false information will nevertheless drain substantial resources and cause mental anguish when it is objectively credible.").

2. Petitioner relies (Pet. 26-28) on this Court's decision in *Black*, *supra*, in arguing that a communication qualifies as a "true threat[]" only if the speaker subjectively intends for his communication to be taken as a serious threat. *Black* did not address, much less resolve, the question whether a speaker must have a subjective intent to threaten before his communication will be deemed a "true threat" outside the protection of the First Amendment.

The question in *Black* was whether a Virginia statute banning cross-burnings with an intent to intimidate a person or group of persons violated the First Amendment because it was content-based. 538 U.S. at 347, 360-363. The Court held that the statute was not impermissibly content-based, explaining that it pro-

hibited all cross-burnings with the intent to intimidate, regardless of the motivation for such actions; it therefore regulated a type of violent intimidation that is particularly "likely to inspire fear of bodily harm." *Id.* at 362-363. A plurality of the Court concluded, however, that the statute's presumption that the burning of a cross was "prima facie evidence of an intent to intimidate" rendered the statute unconstitutional, as interpreted by the jury instructions given in Black's case. *Id.* at 363-367 (opinion of O'Connor, J.). Because some cross-burnings may be protected "political speech" rather than intended to intimidate, the plurality reasoned, the statute as interpreted through the jury instructions "create[d] an unacceptable risk of the suppression of ideas." *Id.* at 365 (quoting *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984)).

It is true that the Court in *Black* observed both that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359, and that a statement made "with the intent of placing the victim in fear of bodily harm or death" is a "*type* of true threat," *id.* at 360 (emphasis added). But *Black* did not hold that the category of true threats is limited to such statements. Because the Virginia statute at issue required an intent to intimidate, the Court had no occasion to consider whether the fear and disruption brought about by true threats justify a prohibition of such statements when a person knowingly makes statements that a reasonable person would understand as expressing a serious intent to do harm. The court of

appeals' decision here is therefore consistent with this Court's decision in *Black*.

3. a. Petitioner also argues (Pet. 3-4, 19-23) that some courts of appeals have reconsidered whether it is appropriate to employ an objective standard in the wake of this Court's decision in *Black*. But the only circuit to do so is the Ninth Circuit, and different panels of that court have resolved the question differently.

Contrary to petitioner's suggestion (Pet. 23), for example, the Tenth Circuit in *United States* v. *Magleby*, 420 F.3d 1136 (2005), cert. denied, 547 U.S. 1097 (2006), did not indicate that it should abandon the reasonable-speaker test it had adopted before the decision in *Black*. *Id.* at 1141. Although the Tenth Circuit did cite *Black* for the proposition that "[t]he threat must be made 'with the intent of placing the victim in fear of bodily harm or death,'" *id.* at 1139 (quoting *Black*, 538 U.S. at 360), petitioner acknowledges (Pet. 22-23) that that statement was dictum. The question before the Tenth Circuit, on collateral review, was whether the defendant's appellate counsel had rendered ineffective assistance by failing to challenge the jury instructions on the ground that they did not "convey that he could be convicted only if his cross burning constituted a threat of unlawful violence to identifiable persons." *Magelby*, 420 F.3d at 1139. The court's decision did not turn on whether a subjective intent to threaten is required for a "true threat." See *id.* at 1141-1143. Petitioner also correctly acknowledges (Pet. 22-23) that the Seventh Circuit's statement in *United States* v. *Parr*, 545 F.3d 491 (2008), cert. denied, 556 U.S. 1181 (2009), that the issue of subjective intent might be raised by the decision in

Black was dictum as that court declined to "resolve the issue," *id.* at 500.

The Ninth Circuit is the only court of appeals to issue decisions holding that the First Amendment requires proof of subjective intent to threaten harm, but its approach has been inconsistent, both before and after the decision in *Black*. In *United States* v. *Cassel*, 408 F.3d 622 (2005), the Ninth Circuit considered whether 18 U.S.C. 1860, which makes it a crime to "by intimidation * * * hinder[], prevent[], or attempt[] to hinder or prevent, any person from bidding upon or purchasing any tract of" federal land at public sale, required proof that a defendant intended to intimidate his victim. 408 F.3d at 626-627. The court canvassed pre-*Black* circuit decisions addressing whether various federal statutes criminalizing threats required proof of a subjective intent to threaten or intimidate. *Id.* at 628-630. Some Ninth Circuit decisions, the court noted, had held that no such proof was required if a reasonable person would have understood the defendant's statement to be threatening; other decisions had held that a particular statute required proof of a subjective intent to threaten and that such a proof requirement defeated any First Amendment challenge. *Ibid.* (citing *United States* v. *Hanna*, 293 F.3d 1080 (2002); *Planned Parenthood of the Columbia/Willamette, Inc.* v. *American Coal. of Life Activists*, 290 F.3d 1058 (2002) (en banc), cert. denied, 539 U.S. 958 (2003); *United States* v. *Orozco-Santillan*, 903 F.2d 1262 (1990); *United States* v. *Gilbert*, 813 F.2d 1523, cert. denied, 484 U.S. 860 (1987); *Roy* v. *United States*, 416 F.2d 874 (1969)).

The panel in *Cassel* then concluded that this Court in *Black* had announced a rule that "speech may be

deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." 408 F.3d at 633. Less than two months after the decision in *Cassel*, however, the Ninth Circuit reaffirmed its earlier holding that, in order to prove a threat against the President in violation of 18 U.S.C. 871(a), the government need only establish that a reasonable person would view the statement as threatening, albeit in a case that did not involve a First Amendment challenge. *United States* v. *Romo*, 413 F.3d 1044, 1051 & n.6 (2005), cert. denied, 547 U.S. 1048 (2006). The panel in *Romo* explained that the decision in *Cassel* "did not address whether statutes like 18 U.S.C. § 871(a) require intent." 413 F.3d at 1051 n.6. The court later noted that the Ninth "[C]ircuit has thus far avoided deciding whether to use an objective or subjective standard in determining whether there has been a 'true threat,'" and that, since *Black*, it has "analyzed speech under both an objective and a subjective standard." *Fogel* v. *Collins*, 531 F.3d 824, 831 (2008).

More recently, in *United States* v. *Bagdasarian*, 652 F.3d 1113 (2011), the Ninth Circuit considered a prosecution for violating 18 U.S.C. 879(a)(3), which makes it a crime to, *inter alia*, "knowingly and willfully threaten[] to kill, kidnap, or inflict bodily harm upon * * * a major candidate for the office of President." 652 F.3d at 1116. As the panel in *Bagdasarian* noted, the Ninth Circuit had previously held, as a matter of statutory construction, that a conviction for violating Section 879(a)(3) required proof of a subjective intent to threaten. *Id.* at 1117 & n.13 (citing *United States* v. *Gordon*, 974 F.2d 1110, 1117 (9th

Cir. 1992), overruled on other grounds by *Planned Parenthood*, *supra*). Although it was thus clear under circuit precedent that the government was required to prove a subjective intent to threaten in that case, the panel nonetheless sought to "clear[] up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment." *Id.* at 1116-1117. The panel concluded that "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech." *Id.* at 1117. The panel opined that the contrary statement in *Romo* "must be limited to cases in which the defendant challenges compliance only with the objective part of the test and does not contend either that the subjective requirement has not been met, or that the statute has been applied in a manner that is contrary to the Constitution." *Id.* at 1118 n.14.

The Ninth Circuit is therefore the only court of appeals that has held that any statute criminalizing threats requires proof of a subjective intent to threaten and it has done so in the face of contrary prior panel decisions. Given that *Bagdasarian* was issued less than three years ago, and in light of the possibility that the Ninth Circuit will resolve its apparent internal disagreements through the en banc process, review by this Court of that issue would be premature at this time. Although the Ninth Circuit denied the government's en banc petition in *Bagdasarian*, it may reconsider the question in a future case, particularly in light of the decision below and other recent decisions that all reject the argument that *Black* requires a "subjective" intent analysis in all "true threats" cases. See *United States* v. *Martinez*, 736 F.3d 981,

985-988 (11th Cir. 2013), petition for cert. pending, No. 13-8837 (filed Feb. 21, 2014); *Jeffries*, 692 F.3d at 480-481; *United States* v. *Williams*, 690 F.3d 1056, 1062 (8th Cir. 2012), cert. denied, 133 S. Ct. 1516 (2013); *White*, 670 F.3d at 507-512.

b. Petitioner also argues (Pet. 4, 23-25) that review is warranted because eight state courts of last resort conflict with the federal circuit courts that cover those States about whether a subjective-intent element is required by the First Amendment. Petitioner overstates that concern.

Petitioner argues (Pet. 23) that, although the First and Second Circuits use an objective test, the state courts of last resort in Massachusetts, Rhode Island, and Vermont require proof of subjective intent. Petitioner is incorrect. In *O'Brien* v. *Borowski*, 961 N.E.2d 547 (2012), the Supreme Judicial Court of Massachusetts considered a harassment statute that specifically required the complainant to prove that the defendant engaged in three "or more acts of willful and malicious conduct aimed at a specific person committed *with the intent* to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property." *Id.* at 552 (emphasis added). Relying on *Black*, the court in *O'Brien* stated that "[t]he intent requirements in the [state statute at issue] plainly satisfy the 'true threat' requirement that the speaker subjectively intend to communicate a threat." *Id.* at 557. As was true with the statute in *Black*, the Massachusetts statute's explicit intent requirement obviated any need to address whether the First Amendment, as construed in *Black*, required a specific intent to threaten. Any suggestion in the state court's opinion

that a specific-intent requirement is necessary under the First Amendment was dictum.

In *State* v. *Grayhurst*, 852 A.2d 491 (2004), the Supreme Court of Rhode Island likewise considered a statute that prohibited extortion in the form of "an oral or a written threat to harm a person or property, * * * accompanied by the intent to compel someone to do something against his or her will." *Id.* at 515 (quotation marks and citation omitted). The Supreme Court of Rhode Island had previously interpreted that statutory language to require proof of a defendant's "subjective intent [to extort with threats] as demonstrated by his or her conduct and by the words he or she used" and declined to "recognize a reasonable person standard as an element [of] the crime of extortion." *State* v. *Price*, 706 A.2d 929, 933 (1998) (cited in *Grayhurst*, 852 A.2d at 515). The court in *Grayhurst* noted this Court's statements in *Black* that communications intended to be taken as threats are not protected by the First Amendment. 852 A.2d at 515 (quoting *Black*, 538 U.S at 359). But, as with *O'Brien*, any suggestion that the category of true threats is limited to communications that a defendant subjectively intends to be threatening would be dictum.

The Supreme Court of Vermont in *State* v. *Miles*, 15 A.3d 596 (2011), considered whether the defendant had violated a probation condition "prohibiting [him] from engaging in 'violent or threatening behavior'" when he "verbally threatened to kill one Bill Brown" when speaking to a mental health nurse. *Id.* at 597. The court relied on the Eighth Circuit's conclusion in *Doe* v. *Pulaski County Special School District*, 306 F.3d 616, 622-624 (2002) (en banc), that "in determining whether statements are true threats of physical

violence unprotected by [the] First Amendment, courts must examine speech in light of [the] entire factual context and consider several factors, including whether [an] objectively reasonable person would view [the] message as [a] serious expression of intent to harm." *Miles*, 15 A.3d at 599. Viewing "the entire context of [the] defendant's statements," the Supreme Court of Vermont held that the defendant's statement did not qualify as "threatening behavior" because the State had not established that Bill Brown was a real person or that the defendant was not delusional when he made the statement. *Id.* at 598-599. That approach does not conflict with the majority approach of the federal courts of appeals. Indeed, the Eighth Circuit's *Doe* decision recognized that at that time "[a]ll the courts to have reached the issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm." 306 F.3d at 622. The *Miles* court did not state that it was holding otherwise.

In his final attempt to create a certiorari-worthy conflict, petitioner points out (Pet. 23) that all the States in the Ninth Circuit that have expressed a view on the issue agree with the prevailing view in the federal courts of appeals that an objective standard is appropriate. As discussed at pp. 18-21, *supra*, the extent of any conflict between those decisions and the rule applied in the Ninth Circuit is unclear, as different panels of the Ninth Circuit have expressed different views on this question. Any conflict that does exist may well resolve itself and does not warrant this Court's review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
DAVID A. O'NEIL
Acting Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

APRIL 2014

REPLY BRIEF

No. 13-983

In the Supreme Court of the United States

ANTHONY D. ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Fl.
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

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REPLY BRIEF FOR THE PETITIONER

The government's brief in opposition is most remarkable for what it *does not* say. It does not dispute that the question whether the First Amendment requires proof of subjective intent to threaten arises "repeatedly" (Br. in Opp. 13), and it acknowledges that two circuits have weighed in just since the Third Circuit decided this case, see *id.* at 14 (citing *United States* v. *Clemens*, 738 F.3d 1 (1st Cir. 2013)); *id.* at 20 (citing *United States* v. *Martinez*, 736 F.3d 981 (11th Cir. 2013), pet. for cert. filed, No. 13-8837 (filed Feb. 21, 2014)). Since the government filed its brief, *still another* court has decided the issue. *Brewington* v. *State*, No. 15S01–1405–CR–309, 2014 WL 1716539, at *1, 10-11 (Ind. May 1, 2014). Nor does the government deny that the issue is an important one: Indeed, it identifies several "comparable federal statutes prohibiting the making of various [other] types of threats" that raise the same concern. Br. in Opp. 14.

The government does not even dispute that the Third Circuit's rule "embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners," *Rogers* v. *United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring), or that imposing prison time for a crime of pure speech based on simple negligence conflicts with "[b]ackground norms for construing criminal statutes," *United States* v. *Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*), , cert. denied, 134 S. Ct. 59 (2013). The government identifies no vehicle problem that would prevent the Court from resolving this issue. See pp. 10-11, *infra*.

The government even has to concede that there is a "circuit split" "on the question whether proof of a true threat requires proof of a subjective intent to threaten." Br. in Opp. 13; see also Adrienne Scheffey, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats after* Virginia *v.* Black, 69 U. Miami L. Rev. (forthcoming Fall 2014), *available at* http://goo.gl/eUJZa6 (pp. 28-31 of SSRN version).

Ultimately, the government can muster just three threadbare arguments against granting the writ. First, it contends, the split is not as deep as petitioner argues, and the Ninth Circuit might abandon the position it has maintained for more than a decade. Br. in Opp. 20. Second, "[r]equiring proof of a subjective intent to threaten" would permit some speech with undesirable effects. *Id.* at 15. Third, this Court has denied review to other petitions raising this issue. *Id.* at 13. None of those arguments withstands scrutiny.

A. The Split Is Real

1. The government's attempt (Br. in Opp. 18-21) to manufacture uncertainty about the Ninth Circuit's application of a subjective intent test since *Virginia* v. *Black*, 538 U.S. 343 (2003), is unavailing. In *United States* v. *Cassel*, 408 F.3d 622 (2005) (O'Scannlain, J.), the Ninth Circuit resolved any uncertainty that might remain from its previous practice by holding that, under *Black*, "only *intentional* threats are criminally punishable consistent[] with the First Amendment." *Id.* at 631. The Ninth Circuit has since reaffirmed its rule in terms too plain to

obfuscate: "[C]learing up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment," that court held, "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech"; it is "not sufficient that objective observers would reasonably perceive such speech as a threat." *United States* v. *Bagdasarian*, 652 F.3d 1113, 1116-1117 (2011). Since *Bagdasarian*, the Ninth Circuit has reaffirmed that bedrock position at least *four times*, in decisions the government does not bother to acknowledge. Compare Pet. 22 n.5 (collecting authorities), with Br. in Opp. 19-20; see *United States* v. *Keyser*, 704 F.3d 631, 638 (2012) ("In order to be subject to criminal liability for a threat, the speaker must subjectively intend to threaten."). Unlike the brief in opposition, the government's *Ninth Circuit* filings display no uncertainty about the governing standard. See Gov't Br. 14-15, *Keyser* (No. 10-10224) ("To determine whether the mailings in this case constituted true threats," the court considers, *inter alia*, "whether [defendant] meant to communicate a serious expression of an intent to commit an act of unlawful violence.") (internal citation and quotation marks omitted).

The government's claim of uncertainty centers on *United States* v. *Romo*, 413 F.3d 1044 (9th Cir. 2005). But, as the government concedes, that "case did not involve a First Amendment challenge," Br. in Opp. 19, and *Bagdasarian* explicitly held that *Romo*'s statement "must be limited to cases" like *Romo* itself,

"in which the defendant * * * does not contend either that the subjective requirement has not been met or that the statute has been applied in a manner that is contrary to the Constitution," *id.* at 20 (quoting *Bagdasarian*, 652 F.3d at 1118 n.14). Because *Romo* involved no First Amendment claim, it does not represent a departure from the Ninth Circuit's consistent post-*Black* practice.

The government's suggestion that the Ninth Circuit might reconsider its position "through the en banc process," Br. in Opp. 20, is fanciful. The government has maintained since at least 2005 that "law in the Ninth Circuit remains in a state of flux" that, given time, would eventually resolve itself. Br. in Opp. 10, *Stewart* v. *United States* (No. 05-5541); accord Br. in Opp. 13, *Parr* v. *United States* (No. 08-757). The government's insistence on awaiting en banc consideration reaffirms its previous acknowledgement that this issue involves a "**QUESTION[] OF EXCEPTIONAL IMPORTANCE**," Amended Gov't Pet. For Rehearing En Banc 7, *United States* v. *Bagdasarian*, 652 F.3d 1113 (2011) (No. 09-50529). But as the government concedes, "the Ninth Circuit denied the government's en banc petition in *Bagdasarian*," *ibid.* Indeed, "no judge * * * requested a vote on whether to rehear the matter en banc." Order, *Bagdasarian*, 652 F.3d 1113 (No. 09-50529) (filed Dec. 2, 2011). If the government won not even a *single vote* for rehearing, it is well past time to stop entertaining its shopworn assurances that circuit uniformity is just around the corner.

2. Indeed, any judicial reconsideration is likely to deepen, not erode, the split, as more courts begin to

acknowledge that the Ninth Circuit's test is compelled by *Black*. The government acknowledges that "the Tenth Circuit did cite *Black* for the proposition that '[t]he threat must be made with the intent of placing the victim in fear of bodily harm or death,'" Br. in Opp. 17 (quoting *United States* v. *Magleby*, 420 F.3d 1136, 1139 (2005)); and that the Seventh Circuit has recognized that *Black* undermines its position, *id.* at 17-18 (citing *United States* v. *Parr*, 545 F.3d 491, 500 (2008)). One academic commentator noted, "the Second, Seventh, and Sixth Circuits appear disposed to abandon the purely objective test." Scheffey, 69 U. Miami L. Rev. at 31. And just days ago, the Indiana Supreme Court concluded that "[t]he 'intent' that matters is * * * whether [the defendant] *intends* [the threat] to 'plac[e] the victim in fear of bodily harm or death,'" and "[t]he speaker's intent, then, is often the deciding factor between whether a communication is 'constitutionally proscribable intimidation' or protected 'core political speech.'" *Brewington*, 2014 WL 1716539, at *10 (quoting *Black*, 538 U.S. at 359-360, 365).

3. Because *Brewington* conflicts with the Seventh Circuit's current test, it underscores an aspect of the conflict that makes this Court's review particularly pressing: Many state supreme courts have adopted a standard conflicting with that of the corresponding federal circuit. See Pet. 23-25. The government does not deny that such state-federal conflict represents an important reason for this Court to grant review; it only maintains that this concern is "overstate[d]" (Br. in Opp. 21), based on its peculiar reading of Ninth

Circuit and state precedents. But the Ninth Circuit's actual position plainly conflicts with the objective standard that the supreme courts of California, Hawaii, Montana, Oregon, and Washington have adopted. See Pet. 23-24.

The state supreme courts of Massachusetts, Rhode Island, and Vermont likewise all require subjective intent to threaten, see Pet. 3, 21, 23, while the corresponding federal circuits require only an objective one, see *ibid.* The government tries to minimize this conflict by claiming that the Massachusetts and Rhode Island decisions represent *dicta*. See Br. in Opp. 21-23. The government's conception of "*dicta*" is, to put it mildly, unconventional. The government admits that the Massachusetts Supreme Judicial Court concluded that a "'true threat' require[s] that the speaker subjectively intend to communicate a threat," Br. in Opp. 21 (quoting *O'Brien* v. *Borowski*, 961 N.E.2d 547, 557 (2012) (internal quotation marks omitted)), and that the Rhode Island Supreme Court likewise concluded that true threats are only those "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *State* v. *Grayhurst*, 852 A.2d 491, 515 (2004) (quoting *Black*, 538 U.S. at 359), see Br. in Opp. 22. Because those courts *also* held that the statutes in question required a subjective showing and thus satisfied the constitutional test, *O'Brien*, 961 N.E.2d at 557; *Grayhurst*, 852 A.2d at 515, the government maintains those statements were *dictum*. Br. in Opp. 21-22. Under the government's peculiar conception, a court could establish a constitutional rule only when

invalidating a statute or government action, not when upholding it. But this Court has never given case holdings such a narrow sweep. Cf. *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 126 (1996) (describing what *Washington* v. *Davis*, 426 U.S. 229, 237 (1976), "held," although that case upheld the action at issue).

Finally, the government's contention that *State* v. *Miles*, 15 A.3d 596 (Vt. 2011), applied an objective standard is hard to square with *Miles*' statement that "[w]ithout a finding that [the defendant's] statement represented an actual intent to put another in fear of harm or to convey a message of actual intent to harm a third party, the statement cannot reasonably be treated as a threat." *Id.* at 599. It is harder still to reconcile with *Miles*' progeny, which clearly read the decision to require subjective intent in various contexts. *E.g.*, *State* v. *Johnstone*, 75 A.3d 642, 647 (Vt. 2013) (quoting *Miles* in concluding "even an expression of a desire or plan to harm someone cannot reasonably be treated as a threat under [state probation conditions] '[w]ithout a finding that [the] statement represented an actual intent to put another in fear'"); cf. *State* v. *Cahill*, 80 A.3d 52, 57 (Vt. 2013) (citing *Black* for proposition that jury must find that the defendant "intended to threaten [the victim]"). At most, the language in *Miles* the government cites indicates that Vermont *also* requires that a threat satisfy the objective test.

B. The Third Circuit's Negligence Rule Is Wrong

1. The government does not dispute that "what an objective test does" is "reduc[e] culpability on the all-

important element of [18 U.S.C. § 875(c)] to negligence." *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*). The government does not even *attempt* to reconcile its position with this Court's traditional "reluctan[ce] to infer that a negligence standard was intended in criminal statutes," particularly "for a statute that regulates pure speech." *Rogers*, 422 U.S. at 47 (Marshall, J. concurring).

Instead, the government defends the Third Circuit's negligence standard on grounds of pure expedience: "A statement that a reasonable person would regard as a true threat creates * * * fear and disruption, regardless of whether the speaker subjectively intended the statement to be innocuous." Br. in Opp. 15. But the fact that a type of statement causes harm has never been thought a sufficient basis for imposing even strict *civil* liability for it, much less subjecting a person to imprisonment. For example, a public official undoubtedly suffers injury to reputation when a newspaper prints a defamatory falsehood, regardless of whether the author believed the statement to be true. But because speech needs "breathing space to survive," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), the First Amendment requires a heightened showing that the statements were made "with knowledge that [the information] was false or with reckless disregard of whether it was false or not." *New York Times* v. *Sullivan*, 376 U.S. 254, 280 (1964).

By the same token, fundamental principles of First Amendment law prohibit imprisoning a person for negligently misjudging how others would construe his words. First Amendment doctrine in many con-

texts imposes "*mens rea* requirements that provide breathing room * * * by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

2. It is therefore unsurprising that this Court explained in *Black* that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359 (citations omitted), and that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

Parsing *Black*'s language, the government argues that the Court's statement that intentional threats are "a '*type* of true threat,'" did not explicitly "hold that the category of true threats is limited to such statements." Br. in Opp. 16 (emphasis added by the government). And, the government adds, "[b]ecause the Virginia [cross-burning] statute * * * required an intent to intimidate, the Court had no occasion to consider" whether an intent to intimidate was constitutionally required. *Ibid.* But the government offers no explanation why the Court would have invalidated the statute's presumption of intent to threaten from the mere fact of cross burning, unless an intent to intimidate were constitutionally required. See *Black*, 538 U.S. at 366 (plurality opinion) (concluding provision is constitutionally invalid because it "does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross

burning done with the purpose of threatening or intimidating"). "If there is no such First Amendment requirement, then Virginia's statutory presumption was * * * incapable of being unconstitutional in the way that the majority understood it." Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217.

C. There Is No Reason To Delay Review

The government's claim (Br. in Opp. 13) that "[t]his Court has repeatedly and recently denied petitions for a writ of certiorari raising the same issue" neglects to mention the significant differences between those cases and this case. In none of those cases did petitioners note state courts of last resort that had construed *Black* to require a showing of subjective intent, nor did they consider conflicts between state courts and corresponding federal circuits. And in each of those cases, the government identified vehicle problems that would have prevented this Court from reaching the issue and affording relief. See Br. in Opp. 10-11, 23-24, *Jeffries* v. *United States* (No. 12-1185) (jury instruction required finding defendant had "*purpose to* * * * achieve some goal through intimidation" akin to finding of subjective intent, so any error "was harmless"); Br. in Opp. 22-23, *Williams* v. *United States* (No. 12-7504) (different statute; any error was harmless); Br. in Opp. 11, 16, 29, *Mabie* v. *United States* (No. 11-9770) (petitioner "waived th[e] argument" by "propos[ing] that the district court define the term 'true threat' with reference to the perspective of a 'reasonable recipient'"; "any error

was harmless": "jury may well have understood that it was required to find a subjective intent to threaten"); Br. in Opp. 7, 9, 13, 16, *Parr* (No. 08-757) (different statute; interlocutory posture; jury instruction required finding "petitioner 'intended his statement to be understood [as a threat]'"; "court of appeals did not reach [question]"; any error was harmless); Br. in Opp. 6, 10-11, 13, *Stewart* (No. 05-5541) ("any error * * * [was] harmless"; "[p]etitioner did not argue in the court of appeals that *Black* requires proof of an intent to threaten"; "[i]n light of the ambiguity in the [jury] instructions, this case does not squarely present the question").

By contrast, this case is striking for the government's inability to identify *any issue* that would prevent the Court from resolving this frequently recurring question. Compare Br. in Opp. 18-19 & n.3, *Martinez* v. *United States* (No. 13-8837) (case concerns "sufficiency of the indictment, not the content of any jury instructions," and petitioner is limited to claim of facial invalidity because of stipulation that threat was made "with 'an apparent determination to carry [it] out'").[1]

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[1] The government notes that the jury instructions stated that the statute did not prohibit "idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger." Br. in Opp. 14 (quoting C.A. App. 547). The government tellingly does not contend that the instruction poses an obstacle to resolution of the question presented, and indeed it could not: The *very next sentence* instructed the jury that all that

* * * * *

As a coalition of First Amendment advocacy groups explains, "th[e] lower courts urgently need this Court's guidance" on this frequently recurring issue. Br. of Thomas Jefferson Center *et al.* as *amici curiae* 3. This is an "ideal case" to resolve persistent confusion about the constitutional standard governing threats because it involves the use of social media that "underlie the vast majority of contemporary threat cases." *Id.* at 2-3. Further review is warranted.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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mattered was how an objective "reasonable person" would have viewed statements; it was irrelevant if petitioner considered statements "idle or careless talk[or] exaggeration" so long as a "reasonable person" would have taken them seriously. C.A. App. 547. Cf. *Rosemond* v. *United States*, 134 S. Ct. 1240, 1252 (2014) (broad statement in instruction did not "cure[] the court's error" where next sentence erroneously explained its application to that case).

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Floor
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MAY 2014

AMICUS CURIAE BRIEF

No. 13-983

In the Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, AND THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Clay Calvert
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
P.O. Box 118400
Gainesville, FL 32611
Telephone: 352-273-1096
Email: ccalvert@jou.ufl.edu

J. Joshua Wheeler*
Clayton N. Hansen
The Thomas Jefferson
Center the Protection
of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
Telephone: 434-295-4784
Email: jjw@tjcenter.org
*Counsel of Record

(Counsel continued on inside cover)

Robert D. Richards
Pennsylvania Center for
the First Amendment
308 James Building
University Park, PA 16802
Telephone: 841-863-1900
Email: rdr2@psu.edu

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STATEMENTS OF INTEREST OF AMICI CURIAE[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. In fact, the Thomas Jefferson Center was significantly involved in *Virginia v. Black*, the case that is at the heart of the matter now before this Court. In *Virginia v. Black*, the Center filed *amicus curiae* memoranda or briefs in the Carroll County Circuit Court, the Virginia Court of Appeals, the Virginia Supreme Court, and this Court.

The Marion B. Brechner First Amendment Project, formerly known as the Marion Brechner Citizen Access Project, is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary

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[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition, and freedom of thought. The Project's director has published scholarly articles on the true threats doctrine, the subjects at issue in this case.

The Pennsylvania Center for the First Amendment is a leading national research center about the First Amendment housed in the College of Communications at Penn State. For more than 20 years, the Pennsylvania Center for the First Amendment has been a leader in education, research and outreach concerning the fundamental rights of free expression and free press in the United States. Founded in 1992, the Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

ARGUMENT

In light of ongoing uncertainty as to the proper application of *Watts v. United States* and the conflict among circuits following *Virginia v. Black*, it appears certain that this Court will have to revisit the issue of true threats again. *Amici* respectfully suggest that this is the ideal case with which to do so, as it provides this Court the opportunity to determine whether the true threat analysis developed by *Watts* and *Black* can adequately address issues raised by

the emergence of social networking and other modern modes of communication that, while not yet prominent when those cases were heard, underlie the vast majority of contemporary threat cases.

By accepting the Petition in this matter, this Court can also address for the first time whether the nature of the medium through which speech is conveyed affects a true threat analysis. This is an important question because individuals increasingly face prosecution for alleged threats conveyed on new media, including Facebook, YouTube, and Twitter. If context really is a key variable in determining the point at which speech loses First Amendment protection, as this Court made clear in the decidedly pre-Internet cases of *Watts* and *Black*, then lower courts urgently need this Court's guidance on how the context of online social media affects the true threats analysis.

A. This Case Presents an Ideal Opportunity for this Court to Determine Whether Its Current True Threats Doctrine is Compatible with Contemporary Modes of Communication

This Court's existing approach to true threats appears to face challenges that are both backward- and forward-looking. Certain challenges are merely products of the cultural norms and conventions of the period in which *Watts v. United States*, 394 U.S. 705 (1969) (per curiam), was decided. Specifically, the current true threats doctrine was initially constructed exclusively around a particular type of

communication. The face-to-face, political rally rhetoric at issue in *Watts* has been supplanted by anonymous trolls wreaking havoc on message boards and individuals who, perhaps emboldened by too much "digital courage," treat the internet as a global sounding board where anything goes. This leads directly to what will likely be the more pressing challenges, as courts learn to assess, adapt, and ultimately apply *Watts* to a new breed of threat cases informed by the internet, social media, and other revolutionary developments in communication that earlier cases never contemplated.[2]

This case presents the Court with the opportunity to determine whether social media and other modern modes of communication require a reevaluation of *Watts* and *Virginia v. Black*, 538 U.S. 343 (2003), or if those cases remain relevant and fully capable of performing as intended to distinguish threats from constitutionally protected speech. 394 U.S. at 707. This is a question without an obvious answer given the degree to which aspects of contemporary expression are seemingly at odds with the factors discussed in *Watts*.

Both *Watts* and *Black* involved speakers whose identity was known, or at least readily discernable, because the allegedly threatening speech occurred face-to-face, 394 U.S. at 706 (speaking to a small

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[2] While *Black* was decided in 2003, the expression at issue in that case (cross burning) was distinctly analog. This Court has yet to consider the modern incarnation of potentially threatening speech present in this case.

discussion group at a public rally near the Washington Monument), or out in the open, 538 U.S. at 348 (burning a cross before twenty-five to thirty attendees at a rally hosted on private property). This Court may well want to consider how *Watts'* contextual analysis is changed by a shift away from this type of open expression by identifiable speakers toward that which predominates online, where speakers exercise near-complete control over their persona, pseudonyms are often preferred—if not required, and discovering the actual identity of a speaker can require the intervention of law enforcement or other third parties.

While contemporary speakers may exercise more control over their online identities, their ability to control the distribution of their communications is severely constrained. The nature of social networks permits a message intended for one or more specific listeners to be distributed among countless unintended recipients in the blink of an eye, often without the speaker's knowledge or consent. Moreover, messages that a speaker *specifically intends to exclude from certain listeners* may nevertheless be received by those individuals by way of unknown overlaps among the parties' respective social networks.[3] The inability of a speaker to effectively define and limit the audience to whom he

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[3] This could be especially problematic when considering a statute such as 18 U.S.C. §875(c), the same statute that the Petitioner in this case was convicted under. Section 875(c) does not require that a threat be communicated to its supposed target. Instead, it prohibits any "communication containing any threat" regardless of whom it is communicated to.

communicates online or through social media would appear to pose serious problems for a court trying to evaluate an alleged threat under *Watts*, given how important the audience was to the Court's analysis.

The audience figured into two of the three factors mentioned in *Watts*: first, as part of the "context" surrounding the defendant's speech, 394 U.S. at 706 (audience consisted of a small discussion group that splintered off from a larger public rally); and second, as the basis for surmising that the defendant's statement was made in jest, 394 U.S. at 707 (audience reaction—specifically, laughter—indicated that comment was not intended as a serious threat). It seems unlikely that this Court can continue to evaluate true threats under a standard that emphasizes the audience and its reaction to allegedly threatening speech when speakers utilizing social media have so little control over who ultimately hears their message and what those unintended listeners may make of it. On the other hand, it may prove that certain conventions make evaluating alleged threats in the context of social media easier. One could imagine, for example, a court examining the number of "likes" an allegedly threatening post has received on Facebook as evidence of the speaker's true meaning. Social media interaction may ultimately turn out to be a poor analog for an audience's laughter, but the extent to which the factors articulated in *Watts* are adaptable to modern modes of communication will remain unknown until this Court decides to reevaluate its true threat doctrine.

Just as neither *Watts* nor *Black* could have been expected to anticipate the radical changes in contemporary communication exemplified by social media based on their facts, those cases never contemplated alleged threats conveyed in the form of a specific genre of artistic expression. This case, however, does present an opportunity to address whether or not the genre of artistic expression through which a message is conveyed is relevant to a court's evaluation of alleged threats. While *Watts* and *Black* made it plain that context matters, this Court should clarify how non-traditional modes of artistic and political expression affect the contextual analysis and, in turn, the assumptions that can be made about people's understanding (or lack thereof) of that genre. This is especially important in cases like this one where a speaker communicates through a potentially controversial genre of artistic expression like rap music.

Rap, and in particular, certain extreme sub-genres of rap such as gangsta rap, carry with them many negative stereotypes of violence and crime. Furthermore, the genre is freighted with negative racial images and racist stereotypes. Rap has long been part of black oppositional culture, spurring controversies in the late 1980s and early 1990s over lyrics allegedly glorifying—if not encouraging—the killing of police officers. For instance, the rapper Ice-T's heavy metal band, Body Count, released a song titled "Cop Killer" in 1992, featuring lyrics such as "I'm 'bout to bust some shots off/I'm 'bout to dust some cops off" and "fuck the police" (that latter lyric

sung repeatedly). The song drew massive protests from politicians, lawmakers and culture warriors.

As a result of these and other stereotypes broadly associated with rap, a speaker who communicates through quoted verses or who frames his message in a particularly extreme style of rap may find the legal deck stacked against him in a true threat case, with listeners (both intended and unintended), jurors, and even judges perhaps wrongly assuming that the mere form of expression makes it more likely to be a true threat. In short, rap carries with it into court the heavy baggage of negative controversy and stigmatization; it is an entire genre of artistic expression prime for judicial and juror abuse.

Those familiar with rap music understand, however, that it often involves posturing and hyperbole, with rappers boasting and taking on personas to impress others. How should this aspect of art and fantasy affect a court's true threat analysis? This Court recently made it clear that fictional and violent entertainment fare receives First Amendment protection. *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011). Additionally, rap (including "Cop Killer") has long included a protest and political component—speech at the core of First Amendment protection. In summary, rap is complex. It involves political, violent, racial, artistic and cultural components, all of which affect the meaning and interpretation of any given instance of rap. This Court is encouraged to consider the implications of

such complex genres of artistic expression for future true threat cases, as well as what assumptions, if any, might be necessary regarding a reasonable listener's understanding of specific genres in order to ensure that protected speech is neither improperly punished nor chilled.

The questions raised above reflect the realities of contemporary communication including the rapid ascendency of social media and other new modes of expression. These developments cast serious doubt on the ability of this Court's current true threats doctrine to adequately protect speech in the context of social media and other online communications that may appear threatening but does not satisfy the constitutional standard for true threats. While these concerns might be alleviated somewhat were the existing doctrine particularly robust, that is simply not the case. In fact, *amici*'s concern regarding the continued application of *Watts* and *Black* to alleged threats is due in large part to the uncertainty that hangs over those cases.

B. *Watts* and *Black* Remain a Source of Conflict and Confusion Among the Circuit Courts

This Court's conclusion that the First Amendment does not protect "true threats," 394 U.S. at 708, may be the only aspect of that decision that lower courts seem to agree on. From the specific factors that constitute a test for true threats to whether *Watts* established an explicit test in the first place, the various Circuit Courts of Appeal have, over

the past half-century, developed a patchwork of approaches to this complex and rapidly-changing aspect of First Amendment law. *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001) ("The Supreme Court's minimal guidance has left each circuit to fashion its own test."); Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 Wash. L. Rev. 1209, 1216 (1999) (Suggesting that *Watts* "failed to provide guiding analysis" on how courts should distinguish between true threats and protected speech, as "the opinion included no explicit test or criteria broadly applicable to other cases.").

The situation is most evident when one reviews the extent to which the circuits are divided over their approach to examining the "context" surrounding an alleged threat. This Court has consistently emphasized the importance of contextual analysis to its First Amendment jurisprudence. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 778 (1982) (Stevens, J., concurring in judgment) ("Whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context."). Consistent with that belief, *Watts* lists context first among the three factors that led the Court to conclude that the defendant's " only offense . . . was a kind of very crude offensive method of stating a political opposition to the President." 394 U.S. at 708 (internal quotations removed). Although one reading of the brief per curiam opinion suggests

that the Court's examination of context focused on the physical environment in which the alleged threat occurred, *id.* at 707, there is arguably no clear explanation of what the inquiry actually entailed. David C. Potter, Note, *The Jake Baker Case: True Threats and New Technology*, 79 B.U. L. Rev. 779, 791 (1999) (noting that *Watts* failed to "articulate[] a rationale that lower courts can easily apply in examining other threat cases under the First Amendment"). As a result, subsequent courts have developed a myriad of unique formulations for contextual inquiries in true threat cases. Some of these approaches hue closely to the factors articulated in *Watts*, *see, e.g.*, *United States v. Lockhart*, 382 F.3d 447, 451-52 (4th Cir. 2004) (considering whether the alleged threat was made in jest, concerned political matters, or was expressly conditional), but the majority have added or subtracted factors freely. The Eighth Circuit, for example, looks at "how the recipient and other listeners reacted to the alleged threat, whether the threat was conditional, whether it was communicated directly to its victim, [and] whether the maker of the threat had made similar statements to the victim on other occasions." *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000). The Fifth Circuit seeks to distinguish threats from "idle or careless talk, exaggeration, or something said in a joking manner," *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), while the Sixth Circuit suggests that even objectively-threatening speech "cannot constitute a threat unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation." *United States*

v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997). The Second Circuit is among the most unusual in its approach, interpreting *Watts* to say that "only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976). *But see id.* at 1029 (Mulligan, Circuit Judge, concurring) (expressing doubt that the standard articulated by the majority is required either "by the statute []or the First Amendment").

Many observers were optimistic that this Court might resolve at least some of these discrepancies when it agreed to revisit true threats for the first time in more than thirty years in *Virginia v. Black*, 538 U.S. 343 (2003). The nature of the resulting opinion, however, appears to have raised more questions than it answered. *See* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1226 (2006) ("Some Supreme Court decisions clarify a murky area of the law. Others further muddy an area in need of clarification. Unfortunately, the Court's decision in *Virginia v. Black* has proven to be another instance of the latter."). While it did, for the first time, provide an explicit definition of true threats, 538 U.S. at 359 ("True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."), *Black* also led to a split among the circuits as to whether or not the plurality intended to impose a subjective, rather than objective, standard to threats. Crane, 92 Va. L. Rev. at 1261 (noting that

Black actually resulted in "three viable options when it came to the constitutional intent standard for true threats," and that "each approach has found its adherents").

CONCLUSION

Neither *Watts* nor *Black* appears to have resulted in a clear and consistent approach to the analysis of true threats among the lower courts. This uncertainty is likely to be exacerbated further by the proliferation of social networking and other new modes of communication. As such, *amici* respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ J. Joshua Wheeler

Clay Calvert
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
P.O. Box 118400
Gainesville, FL 32611
352-273-1096
ccalvert@jou.ufl.edu

J. Joshua Wheeler*
Clayton N. Hansen
The Thomas Jefferson
Center the Protection
of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
434-295-4784
jjw@tjcenter.org
*Counsel of Record

Robert D. Richards
Pennsylvania Center for
the First Amendment
308 James Building
University Park, PA 16802
Telephone: 841-863-1900
Email: rdr2@psu.edu

JOINT APPENDIX

No. 13-983

In the Supreme Court of the United States

ANTHONY D. ELONIS, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX
VOLUME I

JOHN P. ELWOOD
Counsel of Record
RALPH C. MAYRELL
DMITRY SLAVIN
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Petitioner

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
U.S. DEPARTMENT OF JUSTICE
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent

[Additional Counsel Listed On Inside Cover]

PETITION FOR CERTIORARI FILED FEBRUARY 14, 2014
CERTIORARI GRANTED JUNE 16, 2014

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Fl.
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924–3127

CONOR MCEVILY
VINSON & ELKINS LLP
1001 Fannin Street
Suite 2500
Houston, TX 77002
(713) 758-2222

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The following opinions have been omitted in printing this Joint Appendix because they appear at the following pages in the appendix to the Petition for a Writ of Certiorari:

Third Circuit opinion 1a

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PENNSYLVANIA
(ALLENTOWN)

UNITED STATES OF AMERICA, Plaintiff, vs. ANTHONY DOUGLAS ELONIS, Defendant.	Case No.: 11-cr-00013-LS-1

RELEVANT DOCKET ENTRIES

No.	Filed	Docket Text
	12/08/10	Arrest of ANTHONY DOUGLAS ELONIS (cmc) (Entered: 12/10/10)
1	12/09/10	COMPLAINT as to ANTHONY DOUGLAS ELONIS (1) Affidavit of Special Agent, FBI (er) (Entered: 12/09/10)

2	12/09/10	Minute Entry for proceedings held before Magistrate Judge Henry S. Perkin: Initial Appearance as to Anthony Douglas Elonis held on 12/9/10. Order of Detention as to Anthony Douglas Elonis, signed by Magistrate Judge Henry S. Perin. Detention Hearing set for 12/13/2010 03:30 PM before Magistrate Judge Henry S. Perkin.)
5	12/13/10	MOTION FOR PRETRIAL DETENTION and Certificate of Service by USA as to Anthony Douglas Elonis (Stephan, Sherri) (Entered: 12/13/10)
6	12/13/10	ORDER AS TO ANTHONY DOUGLAS ELONIS (1) that the defendant be committed to the custody of the Attorney General for confinement in a correction facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal; that the defendant be afforded reasonable opportunity for private consultation with counsel; and that, on order of a court of the United States, or on request of an attorney for the government, the person in charge of the corrections facility in which the defendant is confined deliver the defendant to a United States marshal for the purpose of an appearance in

		connection with a court proceeding. Signed Magistrate Judge Henry S. Perkin on 12/13/10. (er) (12/14/10)
10	01/06/11	INDICTMENT as to Anthony Douglas Elonis (1) COUNT(S) 1-5 (jwl) Entered: 12/30/10)
11	01/25/11	MOTION for Bail by ANTHONY DOUGLAS ELONIS, Certificate of Service. (COOPER, BENJAMIN) Modified on 1/26/2011 (fh) (Entered: 01/25/2011)
12	01/25/11	Minute Entry for proceedings held before MAGISTRATE JUDGE HENRY S. PERKIN: Arraignment as to ANTHONY DOUGLAS ELONIS (1) held on 1/25/11. ORDER OF Pretrial DETENTION, SIGNED BY MAGISTRATE JUDGE HENRY S. PERKIN. Plea entered Not Guilty on counts 1–5. DEFENSE ASKED FOR A BAIL REVIEW HEARING SCHEDULED FOR 1/31/2011 AT 1:30 PM. Court Reporter esr.(er,) Modified on 1/31/2011 (cmc,). (Entered: 01/26/2011)
13	01/31/11	Minute Entry for proceedings held before MAGISTRATE JUDGE HENRY S. PERKIN: Bail Hearing as to ANTHONY DOUGLAS ELONIS held on 1/31/11. ORDER OF DETENTION AS TO ANTHONY DOUGLAS ELONIS, Signed by Magistrate Judge Henry S. Perkin. Court Reporter esr.(er,) (Entered:

		01/31/2011)
24	08/24/11	MOTION to Dismiss Indictment by ANTHONY DOUGLAS ELONIS. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(COOPER, BENJAMIN) (Entered: 08/24/2011)
26	10/11/11	Proposed Jury Instructions by ANTHONY DOUGLAS ELONIS Certificate of Service(COOPER, BENJAMIN) (Entered: 10/11/2011)
30	10/11/11	Proposed Jury Instructions by USA as to ANTHONY DOUGLAS ELONIS and Certificate of Service (STEPHAN, SHERRI) (Entered: 10/11/2011)
33	10/11/11	RESPONSE in Opposition re 24 MOTION to Dismiss Indictment filed by USA
34	10/20/11	MEMORANDUM AS TO ANTHONY DOUGLAS ELONIS. Signed by HONORABLE LAWRENCE F. STENGEL on 10/20/2011. Entered and Copies E–Mailed. (ap,) (Entered: 10/20/2011)
35	10/20/11	ORDER AS TO ANTHONY DOUGLAS ELONIS THAT THE MOTION TO DISMISS THE INDICTMENT IS DENIED. Signed by HONORABLE LAWRENCE F. STENGEL on 10/20/2011. Entered and Copies E–Mailed. (ap,) (Entered: 10/20/2011)

36	10/21/11	Minute Entry for proceedings held before HONORABLE LAWRENCE F. STENGEL: Voir Dire & Jury Trial Day 1 held on 10/17/2011 as to ANTHONY DOUGLAS ELONIS. Jurors called, sworn, voir dire and selected. Jurors sworn. Counsel make opening statements to the Court and Jury. FBI agent called, sworn and testified. Court Reporter ESR.(ap,) (Entered: 10/21/2011)
38	10/21/11	Minute Entry for proceedings held before HONORABLE LAWRENCE F. STENGEL: Jury Trial Day 2 as to ANTHONY DOUGLAS ELONIS held on 10/19/2011. All parties, counsel, jurors present – trial resumes. Witnesses called, sworn and testified. Court Reporter ESR.(ap,) (Entered: 10/21/2011)
39	10/21/11	Minute Entry for proceedings held before HONORABLE LAWRENCE F. STENGEL: JURY TRIAL Day 3 as to ANTHONY DOUGLAS ELONIS (1) held on 10/20/2011. All parties, counsel, jurors present – trial resumes. Defendant called and sworn. Counsel make closing arguments to the Court and Jury. Court charges the jury. Alternate jurors are thanked and dismissed. CSO sworn. Jurors retire to deliberate in the custody of the CSO. Court addresses the jury's question.

		Jurors resume deliberations. Verdict: Not Guilty on Count 1; Guilty on Count 2–5. Court thanks, dismisses jury. PSR ordered. Court will schedule a sentencing date approximately 90 days from this day. No change in bail status. Court Reporter ESR. (ap,) (Entered: 10/21/2011)
62	06/18/12	MOTION to Dismiss Indictment with Prejudice under Rule 12(b)(3); Alternatively, for New Trial under Rule 33(a), to Arrest Judgment under Rule 34(b) and/or Dismissal under Rule 29(c) by ANTHONY DOUGLAS ELONIS. (LEVINE, RONALD) (Entered: 06/18/2012)
70	08/07/12	RESPONSE in Opposition re 62 MOTION to Dismiss Indictment with Prejudice under Rule 12(b)(3); Alternatively, for New Trial under Rule 33(a), to Arrest Judgment under Rule 34(b) and/or Dismissal under Rule 29(c) filed by USA (ZAUZMER, ROBERT) (Entered: 08/07/2012)
71	08/15/12	RESPONSE IN SUPPORT to Motion by ANTHONY DOUGLAS ELONIS MOTION to Dismiss Indictment with Prejudice under Rule 12(b)(3); Alternatively, for New Trial under Rule 33(a), to Arrest Judgment under Rule 34(b) and/or Dismissal under Rule 29(c) (LEVINE, RONALD) Modified on 8/16/2012 (cmc,).

(Entered: 08/15/2012)

77	09/25/12	MEMORANDUM AS TO ANTHONY DOUGLAS ELONIS. Signed by HONORABLE LAWRENCE F. STENGEL on 9/19/2012.9/25/2012 Entered and Copies E–Mailed. (ap,) (Entered: 09/25/2012)
78	09/25/12	ORDER AS TO ANTHONY DOUGLAS ELONIS THAT THE MOTION TO DISMISS INDICTMENT UNDER RULE 12(b)(3); ALTERNATIVELY, FOR NEW TRIAL UNDER RLE 33(a), TO ARREST JUDGMENT UNDER RULE 34(b) AND/OR DISMISSAL UNDER RULE 29(c) IS DENIED. Signed by HONORABLE LAWRENCE F. STENGEL on 9/19/2012. Entered and Copies E–Mailed. (ap,) (Entered: 09/25/2012)
82	09/28/12	JUDGMENT AS TO ANTHONY DOUGLAS ELONIS (1), Count(s) 1, NOT GUILTY; Count(s) 2–5, IMPRISONMENT: 44 MONTHS, SUPERVISED RELEASE: 3 YEARS, SPECIAL ASSESSMENT: $400 AS TO ANTHONY DOUGLAS ELONIS. Signed by HONORABLE LAWRENCE F. STENGEL on 9/28/2012. Entered and Copies Mailed, E–Mailed BY CHAMBERS. (ap,) (Entered: 09/28/2012)
83	10/01/12	NOTICE OF APPEAL by ANTHONY DOUGLAS ELONIS Filing fee $ 455.

		(LEVINE, RONALD) (Entered: 10/01/2012)
92	10/17/13	ORDER of USCA (certified copy) as to ANTHONY DOUGLAS ELONIS re Notice of Appeal – Final Judgment that the petition for rehearing by the panel and the Court en banc, is denied. (ap,) (Entered: 10/17/2013)
93	10/22/13	JUDGMENT of USCA (certified copy) as to ANTHONY DOUGLAS ELONIS Notice of Appeal – Final Judgment, Notice of Appeal – Final Judgment that the judgment of the District Court entered 9/28/2012 be and the same is hereby affirmed. (ap,) (Entered: 10/22/2013)
94	10/25/13	MANDATE of USCA (certified copy) as to ANTHONY DOUGLAS ELONIS that the judgment of the District Court entered 9/28/2012 be and the same is hereby affirmed. (mac,) (Entered: 10/25/2013)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3798

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

ANTHONY ELONIS,

Defendant – Appellant.

RELEVANT DOCKET ENTRIES

Date	Docket Entry
10/03/12	CRIMINAL CASE DOCKETED. Notice filed by Anthony Douglas Elonis in District Court No. 5-11-cr-00013-001. (DW)
01/16/13	ECF FILER: ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellant Anthony Douglas Elonis, filed. Certificate of Service dated 01/16/2013 by US mail, ECF. - STRICKEN per Clerk's Order of 1/30/13. Corrected brief filed on 1/25/13.--[Edited 01/30/2013 by MS] (RHL)

Date	Docket Entry
1/16/13	ECF FILER: ELECTRONIC APPENDIX on behalf of Appellant Anthony Douglas Elonis, filed. Certificate of Service dated 01/16/2013 by US mail, ECF. (RHL)
1/25/13	ECF FILER: Motion filed by Appellant Anthony Douglas Elonis to File a Corrected Brief. Certificate of Service dated 01/25/2013.-[Edited 01/25/2013 by MS] (RHL)
1/25/13	ECF FILER: CORRECTED ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellant Anthony Douglas Elonis, filed. Certificate of Service dated 01/25/2013 by ECF, US mail.--[Edited 01/25/2013 by MS] (RHL)
1/30/13	ORDER (Clerk) granting Motion by Appellant for Leave to File a Corrected Brief with filing as of January 25, 2013. The electronic brief previously filed by Appellant on January 16, 2013 will be stricken. Counsel must retrieve the hard copies of the previously filed brief within 14 days of the date of this order or such wil be discarded. Appellee's brief must be filed and served within 30 days of the date of this order. (MS)
2/26/13	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellant Anthony Douglas Elonis, filed. Certificate of Service dated 03/29/2013 by ECF, US mail. (RHL)

Date	Docket Entry
6/7/13	Oral Argument Notification for Friday, 06/14/2013. (PM)
6/10/13	ORDER (SCIRICA, HARDIMAN and ALDISERT, Circuit Judges) granting Letter Motion by Appellant requesting permission of the Court to allow Ron Levine, Esq. and Abe Rein, Esq. to present Oral Argument, with one attorney making the principal argument and one attorney making the rebuttal argument, filed. Anthony J. Scirica, Authoring Judge. (TLG)
6/14/13	ARGUED on Friday, June 14, 2013. Panel: SCIRICA, HARDIMAN and ALDISERT, Circuit Judges. Ronald H. Levine arguing for Appellant Anthony Douglas Elonis; Robert A. Zauzmer arguing for Appellee United States of America. (PM)
9/04/13	ECF FILER: Letter dated 09/04/2013, filed pursuant to Rule 28(j) from counsel for Appellee USA. This document will be SENT TO THE MERITS PANEL, if/when applicable. (SAS)
9/05/13	ECF FILER: Letter dated 09/05/2013, filed pursuant to Rule 28(j) from counsel for Appellant Anthony Douglas Elonis. This document will be SENT TO THE MERITS PANEL, if/when applicable. (AJR)

Date	Docket Entry
9/19/13	PRECEDENTIAL OPINION Coram: SCIRICA, HARDIMAN and ALDISERT, Circuit Judges. Total Pages: 30. Judge: SCIRICA Authoring. We will uphold Elonis's convictions under 18 U.S.C. 875 (c). (DW)
9/19/13	JUDGMENT, Affirmed. (DW)
10/03/13	ECF FILER: Petition filed by Appellant Anthony Douglas Elonis for Rehearing before original panel and the court en banc. Certificate of Service dated 10/03/2013. (RHL)
10/07/13	ECF FILER: Letter dated 10/07/2013, filed pursuant to Rule 28(j) from counsel for Appellant Anthony Douglas Elonis. This document will be SENT TO THE MERITS PANEL, if/when applicable. (AJR)
10/17/13	ORDER (MCKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, ALDISERT* and SCIRICA*, Circuit Judges) denying Petition En Banc and Panel Rehearing filed by Appellant Anthony Douglas Elonis., filed. SCIRICA, Authoring Judge.*As to panel rehearing only. (DW)
10/25/13	MANDATE ISSUED., filed. (DW)

Date	Docket Entry
1/9/14	U.S. Supreme Court Letter dated 01/06/2014 granting Appellant Anthony Douglas Elonis an extension of time to and including 02/14/2014 to file petition for writ of certiorari. Supreme Court Application No. 13A695. (CRG)
2/20/14	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Anthony Douglas Elonis on 02/14/2014 and placed on the Supreme Court docket on 2/19/14. Supreme Court Case No. 13-983. (CRG)
6/16/14	NOTICE of U.S. Supreme Court disposition at No. 13-983. Petition for Writ of Certiorari filed by Anthony Douglas Elonis granted on 06/16/2014. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. Section 875(c) requires proof of the defendent's subjective intent to threaten." (CND)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO: _____
	:	DATE FILED: _____
v.	:	VIOLATIONS: 18 U.S.C. § 875(c)
ANTHONY DOUGLAS ELONIS	:	(interstate communication of threats – 5 counts)
	:	

INDICTMENT

COUNT I

THE GRAND JURY CHARGES THAT:

On or about October 19, 2010, through on or about October 22, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant

ANTHONY DOUGLAS ELONIS

knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the

Internet, a threatening communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure patrons and employees of Dorney Park and Wildwater Kingdom, located in Allentown, Pennsylvania.

In violation of Title 18, United States Code, Section 875(c).

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 6, 2010, through on or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant

ANTHONY DOUGLAS ELONIS

knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure and kill T.E., a person known to the grand jury.

In violation of Title 18, United States Code, Section 875(c).

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere,

defendant

ANTHONY DOUGLAS ELONIS

knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a threatening communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure employees of the Pennsylvania State Police and the Berks County Sheriff's Department.

In violation of Title 18, United States Code, Section 875(c).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 16, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant

ANTHONY DOUGLAS ELONIS

knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a threatening communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure a kindergarten class of elementary school children.

In violation of Title 18, United States Code, Section 875(c).

COUNT FIVE

On or about November 30, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere,

the defendant

ANTHONY DOUGLAS ELONIS

knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a threatening communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure an agent of the Federal Bureau of Investigation.

In violation of Title 18, United States Code, Section 875(c).

A TRUE BILL:

/s/
GRAND JURY FOREPERSON

/s/
ZANE DAVID MEMEGER
United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 11-013-1
v.	:	
ANTHONY DOUGLAS ELONIS	:	
	:	

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

* * *

DEFENSE REQUEST NUMBER 5
ELEMENTS OF THE OFFENSE CHARGED IN COUNTS 1 - 5
Interstate Transmission of a Threat to Injure – 18 U.S.C. § 875(c)

Title 18, United States Code, Section 875 (c), makes it a Federal crime to knowingly and willfully [send] transmit in interstate or foreign commerce a true threat to [kidnap or] injure any person.

The defendant, Anthony Elonis, can be found guilty of this crime only if the government proves beyond a reasonable doubt the following two elements:

First: That Mr. Elonis [sent] transmitted a [message] communication in interstate or foreign commerce containing a true threat to injure the person of another, as charged; and

Second: That Mr. Elonis did so knowingly and willfully.

To transmit something in "interstate commerce" means to send it from a place in one state to a place in another state.

To transmit something in "foreign commerce" means to send it from a place in the United States to anyplace outside the United States.

The heart of the crime is intentionally [sending] transmitting a true threat in interstate or foreign commerce. The government doesn't have to prove that the defendant intended to carry out the threat.

Authority And/Or Adapted From

Eleventh Circuit, Pattern Criminal Jury Instructions, § 30.3(2010) (modified).

DEFENSE REQUEST NUMBER 6 "COMMUNICATION CONTAINING A TRUE THREAT"

"To constitute 'a communication containing a true threat' under Section 875(c), a communication must be such that a reasonable person (1) would take the

statement as a serious expression of an intention to inflict bodily harm [(the mens rea)], and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation [(the actus reus)]." Both of these elements are required.

With respect to the second element, it is essential to remember that, "although it may offend our sensibilities, a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a 'true threat' under the statute unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation."

"When our law punishes words, we must examine the surrounding circumstances to discern the significance of those words' utterance, but must not distort or embellish their plain meaning so that the law may reach them."

Authority And/Or Adapted From

United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) (modified); United States v. Bagdasarian, 2011 WL 2803583, at *5 (9th Cir. 2011) (unchanged).

DEFENSE REQUEST NUMBER 7
"TRUE THREAT" – DEFINED

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to particular individual or group of individuals." A threat is not idle or careless talk, an

exaggeration, something said in a joking manner or an outburst of transitory anger. A statement is not a threat if it is made during a conversation with an unrelated third party and not made directly to a "victim".

In order to ascertain whether statements are actually "true threats," they must be "viewed 'in context'" to determine whether they were truly threatening, or merely hyperbolic or crude statements, such as offensively worded political rhetoric. You should consider whether the statements were "conditional" or whether they "specified the precise date, time and place," for carrying out the supposed threat. You should consider also "the reaction of the listeners," and whether they were laughing or took the threats seriously. Finally, you should consider who the "listeners" were, and whether the statements were directed to the individuals or groups of individuals identified in Counts 1-5 of the indictment.

The government is not required to prove that Mr. Elonis actually intended to carry out any threat or even that he was then able to carry out any such threat. Rather, the government must prove that he intended to communicate a true threat, rather than some other communication.

Authority And/Or Adapted From

Virginia v. Black, 538 U.S. 343, 344 (2003) (this reasoning is contrary to United States v. Kosma, 951 F.2d 549 (3d Cir. 1991), but is requested here in order to preserve the issue that the test of a true threat should be evaluated based on the defendant's

actual subjective mental state, as opposed to an objective one); Kosma, 951 F.2d at 553-54 (modified).

DEFENSE REQUEST NUMBER 8
"KNOWINGLY" – DEFINED

You have been instructed that in order to sustain its burden of proof, the government must prove that Anthony Elonis acted knowingly. A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether Mr. Elonis acted knowingly may be proven by his conduct and by all of the facts and circumstances surrounding the case.

Authority And/Or Adapted From

1 L. Sand, et al., Modern Federal Jury Instructions - Criminal, Instruction 3A-1 (2006) (citing United States v. Barbosa, 271 F.3d 438, 457-58 (3d Cir. 2001)) (unchanged).

DEFENSE REQUEST NUMBER 9
"WILLFULLY" – DEFINED

The offense of transmitting in interstate or foreign commerce a true threat to injure any person as charged in Counts 1-5 of the indictment requires the government to prove that Anthony Elonis acted "willfully" with respect to an element of the offense. This means the government must prove beyond a reasonable doubt that Mr. Elonis knew his conduct was unlawful and intended to do something that the law forbids. That is, to find that Mr. Elonis acted "willfully," you must find that the evidence proved

beyond a reasonable doubt that he acted with a purpose to disobey or disregard the law. "Willfully" does not, however, require proof that Mr. Elonis had any evil motive or bad purpose other than the purpose to disobey or disregard the law.

Authority And/Or Adapted From

Third Circuit, Model Criminal Jury Instruction, No. 5.05 (2010) (modified).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : Criminal No. 11-CR-13

v. :

ANTHONY DOUGLAS ELONIS :

GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

* * *

GOVERNMENT'S REQUEST NO. 24

Elements of the Offense

In order to prove the defendant guilty of violating section 875(c), the government must establish the following three elements beyond a reasonable doubt:

First: that the defendant threatened to kidnap or to injure [name of victim], as charged in the Indictment;

Second: that the threat was transmitted in inter-

state (or foreign commerce); and,

Third: that the defendant transmitted the threat knowingly and intentionally.

L. Sand, et al., 1-31 Modern Federal Jury Instructions-Criminal §31.02 at 31-7 (2011).

GOVERNMENT'S REQUEST NO. 25

First Element—Threat

The first element the government must establish beyond a reasonable doubt is that the words communicated by the defendant were a threat, as I will define that term for you.

A threat is a serious statement expressing an intention to inflict injury (or to kidnap) at once or in the future, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner. A statement is a threat if it was made under such circumstances that a reasonable person hearing or reading the statement would understand it as a serious expression of intent to inflict injury (or a reasonable person making the statement would foresee that the recipient would understand it as a serious expression of intent to inflict injury).

To determine whether or not the defendant made a threat, you should consider the circumstances under which the statement was made, including its context with respect to surrounding conversation, the language the defendant used, and the reaction of those who heard or read the statement.

It is not necessary that the government prove

that the defendant intended to carry out the threat or that he had the present ability to carry out the threat. A threat may be conditional upon the defendant's ability to carry it out.

L. Sand, et al., 1-31 Modern Federal Jury Instructions-Criminal §31.02 at 31-8 (2011).

* * *

GOVERNMENT'S REQUEST NO. 27

Third Element--Intent to Transmit

The third element the government must establish beyond a reasonable doubt is that the defendant transmitted the threat knowingly and intentionally.

To establish this element, the government must prove that the defendant knowingly and intentionally sent the threat to [the victim] and that this did not occur by accident, mistake or negligence. The government is not required to prove that the defendant intended to carry out the threat.

L. Sand, et al., 1-31 Modern Federal Jury Instructions-Criminal §31.02 at 31-10 (2011).

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 11-13-1
v.	:	Philadelphia, Pennsylvania
ANTHONY DOUGLAS ELONIS	:	

APPEARANCES:

For the Government: SHERRI A. STEPHAN, ESQUIRE
Assistant United States Attorney

* * *

For Defendant: BENJAMIN BRAIT COOPER, ESQUIRE
Federal Defender Association

* * *

[Transcript of Jury Trial – Day 1 – October 17, 2011]

[3] (The following was heard in open court 2:07 p.m.)

THE COURT: When we met this morning before jury selection we had some discussion about what

the government is required to prove in this case and what you might be able to argue or discuss in your opening statements.

I have received the government's trial memo, and we had a chance to discuss really the intent element here. Perhaps, Ms. Stephan, if you could simply state for our record your understanding of what it is the government will be proving here by way of intent and what the government has to prove to show that these were true threats.

MS. STEPHAN: Certainly, Your Honor. It's the government's understanding that we must prove the defendant intended to make a threatening communication and not that he had any subjective intent for it to be perceived as a threat by its recipients.

And, also, that the treat [*sic*] was actually received by somebody who found it to be threatening or placed them in fear. So basically a threat to injure the person of another, but the intent of the defendant is only to post or to send a communication with a threat contained in it.

[4] THE COURT: Okay. Mr. Cooper, do you have anything you want to say on that issue?

MR. COOPER: Yes, Your Honor. Part of that issue was addressed in our pretrial motion to dismiss, and we are restating that position, which is that in order to prove the crime of threats by interstate commerce, the government is required to prove that the speaker --

THE COURT: Could you keep your voice up?

MR. COOPER: Sure. The government is required

to prove that in this case the speaker, Mr. Elonis, intended, specifically intended, to threaten.

The government argues that what is necessary is that he intended to communicate and that that communication could be reasonably perceived as a threat. It's our position that it's not only the intent to communicate but the intent to communicate a threat. And he should be allowed to present that defense.

There is some support for this in the Ninth Circuit with regards to -- the name is Bagradosian (ph) for lack of better pronunciation. But they address this issue, and this is an issue that has come about as a result of a decision in Virginia versus Black as to how to measure the criminal culpability of someone who [5] files communications in any median and how they are to be judged as whether the acts -- those acts, those speaking acts are criminal or not.

It is our position that the government is required to prove that the defendant in this case, Mr. Elonis, subjectively intended to threaten in these postings.

THE COURT: Thank you. With respect to the motion to dismiss, on the issue of what the government has to prove in this case, the Third Circuit has held that the term "knowingly" with respect to threatening speech means that the defendant intentionally made the communication, but not that he intentionally aimed to make a threat. So I'm going to deny the motion to dismiss on that basis.

What the government has to prove here is that the defendant intended, subjectively intended, to

make the statements that the defendant is alleged to have made.

In terms of the government's burden of establishing that these statements were true threats, the United States versus Kosma, K-O-S-M-A case, makes it clear that there is an objective reasonable person test that focuses on the defendant, and the Third Circuit says "The objective reasonable person test [6] requires that the defendant intentionally make a statement, written or oral, in a context and under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm."

So the case law seems to refer to the objective speaker test or the objective recipient test, and the Third Circuit in Kosma stating, "We believe the objective reasonable person standard is the correct standard, and we will adopt it as the law of this circuit," focuses on the objective speaker and not the objective recipient.

Certainly the case law is clear that the context of the statements is relevant and that the context of the statements may be examined by the jury as the finder of fact in determining whether these statements were true threats under 18 U.S. Code, Section 1875(c).

So I certainly think that this is a factual statement. I don't think it's a factual dispute. I don't think it's something that can be resolved as a matter of law, and whether the statements were true threats presents a question of fact for the jury.

With respect to whether Section 875(c) is [7] constitutional, the parties have briefed that and we've given careful consideration to the constitutional arguments, we find that the statute is not overly broad, nor is the statute impermissibly vague, and I will deny motions to dismiss on the constitutional issues.

And we will issue a written decision that confirms those findings shortly. But for your purposes and so we can move forward with the trial, I wanted to simply make those rulings on the record.

* * *

[8] THE COURT: *** In terms of the constitutionality, I know there was some discussion of whether the defense could argue that these statements were constitutionally protected speech. Are we clear about that issue?

MR. COOPER: Well, as I understand it, just so we're stating it for the record, the idea of whether the speak is constitutionally protected is a legal question, not a factual one.

Mr. Elonis, in this case, has in the postings, which I believe are going to be introduced into evidence, made disclaimers in addition to the postings, saying that this is an exercise of free speech and it's prevalent throughout the [9] communications.

I certainly intend to argue that that is on the postings as to what he was doing in the message he was trying to convey, and what a reasonable person would think about that as to whether that's going to be perceived by others as a threat knowing all of the circumstances.

I think the defense is permitted to argue that point. We're not going to argue to the jury that the speech or the communications are protected speech under the first amendment to the constitution. That's a legal question.

THE COURT: If, in fact, the jury finds they're true threats, they're not protected by the constitution.

MR. COOPER: Understood, Your Honor.

THE COURT: Right. If they are statements that don't rise to the level of true threats, then they enjoy a constitutional protection. So I'll inform the jury at the appropriate time that whether they're constitutional is really a question of law, constitutionally-protected is a question of law, but they have to determine whether or not they constitute true threats.

MR. COOPER: Yes, sir.

* * *

[20] Government's Opening Statement

MS. STEPHAN: May it please the Court, good afternoon, ladies and gentlemen. Defendant made threats in this case that scared some and terrified others. That is what we will prove to you during the course of this trial.

You will hear from the targets of his threats. The targets that this man sitting over at counsel table chose, and you will hear why he chose those specific targets.

Each of those witnesses will come before you and they will testify and they will tell you what they read, what they saw, and what they thought. Let me

go through some of that with you.

His wife, one of his targets, her name is Tara Elonis. She will come in this court and she will tell you that she filed for divorce, she left him, she moved out, she took his two kids, and he was angry, and when he got angry he threatened to kill her. You will see and hear about that communication.

You will hear that he was working at Dorney Park. He was demoted and then he was fired. He became angry and he threatened Dorney Park. He threatened specifically that he's "a nuclear bomb and they just fucked with the timer and they better be discussing a damage control plan," among other things that you'll [21] hear.

You'll hear that Dorney Park officials and staff members were frightened and concerned and took action and precautions based upon the threats he made. You will also hear from his wife that she also felt very threatened by his posts and his threats.

You will also hear that law enforcement had the nerve to initiate an investigation against him, and that made him angry once again. And what did he do? He threatened law enforcement.

Specifically, you will hear from the agent sitting right here, Special Agent Denise Stevens. She will tell you that she started an investigation and part of that investigation involved going to see him at his house.

You will hear how he came out on the porch and he went back inside and he made a statement that included the following. "It took all the strength I had not to turn the bitch ghost, pull my knife, flick my wrist, and slit her throat."

All of these people that you'll hear from have one thing in common. They were afraid. Some would say they were terrified. And they all took precautions and other actions based upon those threats.

Now let me give you some context and go a [22] little bit back further in how this all started, where it will start as far as the government's presentation to you over the next few days.

Back in mid-2010, as I already stated Tara Elonis, the defendant's wife, left. She took the kids, she moved out, and she moved in with her father.

Again, you will hear how that was a major event in the defendant's life and it made him angry.

Around the same point in time as this was all going on you will hear that things were not going so well for him at work. Where he worked was Dorney Park and Wild Water Kingdom as (inaudible). He got demoted then he got fired, all based upon his own actions, his own doing, because again, as I said, he got angry.

I want to tell you about some of the other threats you'll hear when these things were starting to happen in his life, as his life was starting to unravel. His wife leaves him, he loses his job.

On October 17th, exactly a year ago today, is the day that he was fired from Dorney Park. Two days later he makes a threat against them in part saying, "Someone once told me that I was a firecracker. Now I'm a nuclear bomb and Dorney Park just messed with the timer. If I was a general manager, I'd be on the phone with Sandusky discussing a damage control plan. But [23] I'm not, and you all haven't heard the last of Anthony Elonis."

A few days later he makes another post. And this post again you'll get to hear, he ends the posting with, "Don't fuck with me." And then a few days later he makes another threat, October 22nd, 2010, and this threat read, "Moles, didn't I tell you I had several. You're all saying I had access to keys for all the fucking gates, that I have sinister plans for all my friends and must have taken a couple home. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween Haunt could be so fucking scary?"

Now, defendant's wife, after she left him filed for a protection from abuse order. You will hear a little bit about that and you'll learn exactly what that is. She basically asked a court to grant her an order protecting her and her children.

You will hear that was done after the Dorney Park threats that I just read to you, and you'll receive more information. Those were partial threats that I just read.

You will hear that the hearing was held November 4th, 2010, and just a couple of days later, [24] after the court did indeed grant his wife a protection from abuse order, he posted a threat that, again, you'll hear the whole entire threat.

But, part of it read, "Do you know it's illegal for me to say I want to kill my wife? It's illegal. It's indirect criminal contempt. It's illegal to say I really, really think someone out there should kill my wife." And there's a lot more to that post that you'll be able to read.

A few days after that, we're talking early November, 2010, he also writes, "Fold up your PFA," Protection From Abuse, "and put it in your pocket. Is it thick enough to stop a bullet?" He also wrote, "And if worse comes to worse, I've got enough explosives to take care of the state police and the sheriff's department."

Now, ladies and gentlemen, you will hear that right after the Dorney Park threats were made and Dorney Park were aware of them, they contacted the Federal Bureau of Investigation as well as local law enforcement. The agent assigned was Special Agent Denise Stevens. And she will tell you that she initiated an investigation and she went onto Facebook, which you're going to hear more about, and she started her investigation through Facebook chats.

[25] Let me tell you a little bit about Facebook because that is the vehicle defendant chose to use. Facebook, as you may or may not already know but will hear some testimony about during the proceedings, is sort of a social networking site. That's the terminology that's always frequently used.

It's a method of immediate communication to people that you want to communicate with, usually so-called friends. But you'll hear that Facebook could have what you call public and private posts, meaning you can go on the internet and you can post something on Facebook and you can leave it out there for anybody who goes onto Facebook to see. You will hear that that is the method all of these threats that I just read to you were posted. And you will hear how they received their intended targets.

You will hear how she went on Facebook, she read the threats for herself, and she decided to go talk to him about this. She took the threats very seriously and, therefore, went to his home to talk to him.

You will hear that he came onto the porch after a period of time of her waiting outside, asked whether or not he had to talk to her. She said no. He went back inside and closed the door.

[26] That very same day you will hear that he posted in part the following, "You know your shit is ridiculous when you have the FBI knocking at your door. Little agent lady stood so close. Took all the strength I had not to turn the bitch ghost, pull my knife, flick my wrist, and slit her throat. Leave her bleeding from her jugular in the arms of her partner. So then next time you knock you best be serving a warrant, and bring your S.W.A.T. and explosive expert while you're at it, because little did ya'll know I was strapped with a bomb. Why do you think it took me so long to get dressed with no shoes on? I was just waiting for ya'll to handcuff me and pat me down, touch the detonator in my pocket, and we'll all go."

Now, as I said, ladies and gentlemen, the vehicle he chose to communicate these threats to his wife, to Dorney Park, the personnel who fired him, to law enforcement, was Facebook.

We will prove to you that he knew each of the people he posted those threats. He knew that they would receive those threats though Facebook. And here is what I submit the evidence will show you.

First, the defendant was fired from Dorney Park

based in part upon Facebook posts. He knew officials at Dorney Park saw a post he put on his [27] Facebook account, told him about it, and fired him because of it.

So, ladies an [*sic*] gentlemen, the government submits we will prove to you he know prior to the posts I just read to you and that you'll hear in evidence during the course of this trial, that Dorney Park looked out and saw his Facebook account.

You'll also hear that the chief of the park patrol, who will come in and testify, his name is Daniel Palm. He will tell you he was a friend of --"friend," Facebook terminology, of the defendant on his Facebook account, meaning that he could access anything on defendant's Facebook account at all.

You will hear that Tara Elonis, his soon to be ex-wife, that her PFA proceedings were based upon threats made to her on his Facebook account prior to the one you're going to hear about in court today.

So I submit to you the government will prove evidence that he knew Tara Elonis looked at his Facebook account because he was in court only days before talking about threats against her on his Facebook page.

Ladies and gentlemen, you will see from what you read and what you hear in court that he knew when FBI came knocking at his door that they were coming [28] because of his Facebook friends.

So he knew, as I will submit to you the evidence will show, and Agent Stevens knocked on that door that day, it was because of the postings on Facebook, and what did he do, ladies and gentlemen? We will prove to you that he posted a threat targeting her

and law enforcement that very same day in a place he knew it would be read.

They all have, as I mentioned earlier, one thing in common. They all were put in fear. They were all intimidated, and they will tell you that from their own mouths, by the threats that were being made against them.

They will also tell you things that they did once they knew that they were the target of threats. You will hear from Dorney Park officials that they indeed contacted local law enforcement, they contacted the FBI, and they made precautions within their park to protect themselves and their patrons if something were to occur.

You will hear from Tara Elonis that she did indeed go get the Facebook -- I mean, sorry, the protection from abuse order, and then monitored his Facebook account to make sure there was nothing new and to see what was going on with him so she could protect [29] herself and her family. So you will hear about precautions that were taken by the people being targeted. They took the threats seriously.

One particular Dorney Park employee will come before you and testify. She worked at the park. She worked directly with the defendant in this case. And she will tell you that she was so fearful that she actually had a hiding place picked out in the Dorney Park grounds in the event something did happen, I mean if she saw him come back into the park after he was fired. She knew exactly where she was going to go and she put a plan of action in place for her own safety. That's how seriously that witness will

tell you she felt threatened by what was going on.

Now, the Judge already told you he is going to tell you what the elements are of the crimes. He is going to read you basically elements and definitions of certain things that you have to find in this case. And obviously it is absolutely the Judge's definitions and the Judge's instructions that you must follow.

I'm going to mention a couple of them to you right now in context with what I anticipate the evidence showing but, once again, you must always follow the Judge's instructions when they're given.

Essentially, the elements I think the Judge [30] is going to tell you about include one, the defendant must threaten to injure another person, that that threat must be transmitted in interstate commerce, and then he must do so essentially knowingly and intentionally. So kind of revert backwards very quickly on what I submit to you we will prove to you in regards to those elements.

First, knowingly and intentionally. You're going to hear the Judge give you several instructions about specifically what that applies to. I submit to you that there are certain things that you will not be considering in this case, and you will not be considering whether or not you think or he did have the ability to carry out any of his specific threats. That will not be an issue that you need to decide in this particular case.

In addition, jury, you will hear a definition of interstate commerce. That may sound a little bit confusing in some ways, but I anticipate the Judge will instruct you that using the Internet in this case, posting things on the Facebook site on the internet,

is transmitting that communication in interstate commerce. So I'll talk more about that during my closing as well. But, that I submit to you will be part of your instructions.

[31] Then obviously that he threatened to injure the person of another. The Judge will give you a definition of what a threat means, what is a threat under this particular crime and what it means.

I think that he'll tell you that it's a serious expression of an intent to inflict injury on another person. Serious intent--serious expression, sorry, of an intent to inflict injury.

I think he'll tell you that it's not either a careless communication, it's not said in a jokingly manner. It's basically a serious expression to inflict injury.

I think the bottom line in this case is whether or not the defendant in this case knowingly and intentionally posted communications that did, in fact, seriously threaten to injure other people, in this case Dorney Park and its patrons and staff, his ex-wife, law enforcement, various law enforcement bodies, and there was another threat. I'm going to close by telling you about the last threat that we are going to prove to you during the course of this trial.

The evidence will show through the various witnesses that the defendant's behavior was getting progressively worse. All of them will describe how it appeared to be escalating and that added to why they [32] were placed in more fear when they read all the different posts that he had.

He posted the following, "That's it. I've had about enough. I'm checking out and making a name for myself. Enough elementary schools in a ten mile

radius to initiate the most heinous school shooting ever imagined. And hell hath no fury that the crazy man in a kindergarten class. The only question is which one?"

As with all the threats that we will present to you during the course of the trial, we will submit to you that they, like the one I just read, is a serious expression of an intent to inflict injury. It is not a joke, it was not carelessly said. It was a serious expression of the intent to inflict injury.

I submit to you the government will prove that this statement, like all others, meet the definition of the crime and ask that you will find him guilty. Thank you.

THE COURT: Thank you, Ms. Stephan. Mr. Cooper, do you wish to make an opening at this time?

MR. COOPER: I do, Your Honor. Thank you.

THE COURT: You may address the jury. (Pause in proceedings.)

[Defendant's Opening Statement]

MR. COOPER: May it please the Court and [33] counsel, ladies and gentlemen, good afternoon. It's a question of the circumstances here. It's a question of the circumstances.

Mr. Elonis lost his job. Mr. Elonis was separated from his wife and was he separated from his kids, who he loved and adored very much, and Mr. Elonis felt that impact.

What he did is he wrote. He wrote about it. He wrote about it on this medium that was called Facebook. Now, back when I was a youngster they

didn't have Facebook.

Now, Facebook is open and people express themselves on Facebook all the time, and they say things. And some people look at that and go okay, and some people look at it and go wow, that's deep. But it's the circumstances under which these communications were made.

My client was under a lot of duress. My client uttered these words, but in his position, and a person that was in his position in those circumstances, was right, and a person in that position we submit would not think that people were going to perceive him as a threat.

You'll hear in this case that Mr. Elonis, in addition to the postings, said in a disclaimer -- he [34] published a disclaimer saying -- talking about freedom of speech, exercising freedom of speech.

You're going to hear that there were comments back and forth on Facebook from people who knew him and said wow. Some people liked that and some people said I don't like that.

But there's this engagement of conversation on Facebook. They're not talking like I'm talking to you. They're talking to each other through the internet. That's what happens now.

And you have all of these published lyrics by all of these rap artists that talk about all of these serious things that are going to happen in violent ways. I mean that's what they listen to. That's what they read. That's what they sing. That's how they communicate.

But, the question is what he did criminal,

because it's the words, it's the words that are at issue here, that make it criminal. It's not whether he could or he couldn't or he did or he didn't, it's the words that are spoken.

So you have at the circumstances. And you have to look at what would be reasonable under the circumstances. Did that person who made that communication think that they were going to be [35] perceived as a threat?

You're going to hear that some of this language that you're going to hear about it being illegal to kill my wife, that this language was not something that he created. This language was already published language, published language by another artist, and he used that as an expression of what he felt.

The question you have to decide I submit in this case is whether a person in Mr. Elonis' position, losing his job, losing his family, feeling angry, feeling bad, feeling sad, a person in that position would think that what they're saying is going to be perceived as a threat.

Is it careless? Is it uttered in anger? Is it idle, because if it's those things, when you decide that at the end of this case, that's not a threat under the statute that he's charged with.

Now, we sit over here on this side of the room, that's the rules. We're not trying to stay away from you. We're not trying to hide from you. The rules are the prosecutor sits there, the defense sits there. Were it our choice, we would sit right here.

There are a couple of guideposts that I want to talk to you about in addition to the rules that I [36] just mentioned, two of them specifically. The first

one is called the presumption of innocence, which you've heard about already from His Honor.

The presumption of innocence means that Mr. Elonis right now is an innocent man, he's an innocent man, and he remains an innocent man unless you collectively decide altogether that the government has proven its case beyond a reasonable doubt.

And the reason we have that rule is so that Mr. Elonis sits here alone with me. He's not part of the government. He's not part of their resources. He doesn't have the authority to charge people with a crime. So he has to have the presumption of innocence.

That was what was created. That was what was made, the law here, that if someone is charged with an offense, that they are presumed to be innocent and they remain innocent, as I talk to you now and throughout this whole trial.

What's the second guidepost? The second guidepost is that the burden is on the government to prove the case, the elements that Ms. Stephan just outlined for you, beyond a reasonable doubt. It's not about whether you think or you suspect. It's got to be a very, very high level of proof.

Again, what's the reason for that? The [37] reason is that the stakes are high, you know, we have someone's liberty at stake. That's a pretty valuable thing.

And so before that loss is undertaken there is going to be a requirement, a requirement that you feel that the evidence has risen to the level beyond reasonable doubt.

You don't have to like what was said. And if you don't like what was said, that's not the issue, whether you like what was said. The issue is did the circumstances show that what was said was a crime.

Now, throughout the case you're going to hear from witnesses and you're going to see documents and you're going to see pieces of evidence. I ask you to keep an open mind and listen to everything.

Listen to the witnesses testify. Listen to if I ask them any questions concerning these features. Consider the relationship that my client had with Tara Elonis and how far back that relationship goes.

I submit that you'll see at the end of the case that she gave it back as much as she got it in terms of the communications they had with each other, and he knew that.

And under those circumstances, that person in that position is not going to be perceived -- does not [38] think they are going to be perceived as a threat. She wasn't even on his Facebook list.

Now, at the end of the case we're going to come back and talk to you some more about what you've seen and what you've heard and summarize what we thought the evidence showed and ask you for your verdict.

I submit to you now that the justice here is to consider the evidence, weigh it, and decide that although Mr. Elonis spoke and although you didn't like some of the words that he said when he spoke, this man is not a criminal. He is not a criminal. He doesn't deserve that. Thank you.

THE COURT: Thank you, Mr. Cooper. You may

call your first witness.

MS. STEPHAN: Thank you, Your Honor. I call Special Agent Denise Stevens.

* * *

APPENDIX G

[Trial Transcript – Day 1 – October 17, 2011]

* * *

[38] COURTROOM DEPUTY: Please state your full name and spell your last name for the record.

THE WITNESS: Denise Stevens, S-T-E-V-E-N-S.

COURTROOM DEPUTY: Thank you.

* * *

[39] DIRECT EXAMINATION

BY MS. STEPHAN:

Q. Agent Stevens, can you please tell me where you're employed?

A. I'm employed with the Federal Bureau of Investigation.

Q. And what is your role or responsibilities there?

A. I'm a special agent. I investigate mostly counter-terrorism and domestic terrorism violations.

Q. And how long have you been employed with the FBI for?

A. For fifteen years.

Q. And --

THE COURT: Could you move the microphone down closer? There you go.

THE WITNESS: Yeah, short person.

[39] BY MS. STEVENS:

* * *

Q. Agent Stevens, can you please tell me where you're employed?

A. I'm employed with the Federal Bureau of Investigation.

Q. And what is your role or responsibilities there?

A. I'm a special agent. I investigate mostly counter-terrorism and domestic terrorism violations.

Q. And how long have you been employed with the FBI for?

A. For fifteen years.

Q. And --

THE COURT: Could you move the microphone down closer? There you go.

THE WITNESS: Yeah, short person.

THE COURT: Thank you.

BY MS. STEVENS:

Q. Has it been the entire time in the same capacity?

A. [40] No, this -- I've been doing counter-terrorism for about two years.

Q. Okay. And what were your roles and responsibilities prior to that?

A. I worked as a surveillance agent in New York

Q. Okay. And did you come -- become involved and actually was assigned to a case involving the defendant here, Anthony Elonis?

A. Yes, I did.

Q. Can you please just give us some of the

preliminaries as to how that came to your attention?

A. Chief Dan Hall of the Dorney Park patrol had contacted our office claiming that a former employee by the name of Anthony Elonis had been posting threats on his Facebook page concerning Dorney Park and the employees and patrons there.

Q. Did he share those postings or those threats with you?

A. Yes, he did.

Q. Did he provide you any more context as to who Anthony Elonis was to them and what prior relationship they had?

MR. COOPER: Objection, Your Honor, as to hearsay. Mr. Hall will testify about the relationship.
THE COURT: Go ahead.

[41] MS. STEPHAN: Sorry, at that point it really just could have been a yes or no answer.

THE COURT: Is it offered for its truth?

MS. STEPHAN: No, Your Honor, it is not.

THE COURT: I'll overrule the objection.

MS. STEPHAN: Thank you.

THE WITNESS: He had explained that Anthony Elonis was an employee there who had been fired.

BY MS. STEPHAN:

Q. Okay. Did he say when he was fired at that point in time?

A. October 17th.

Q. All right. What did you do after you got the initial complaint from Daniel Hall?

A. Initially, I put it into our guardian system which tracks complaints and would help us start an investigation and keep track of our investigative steps.

The first thing we did was we run criminal background checks, we check our databases, we did a clear report on Anthony Elonis and just got some background investigation -- information.

Q. Sorry.

A. After that I myself got a Facebook account and I went onto the Facebook and I viewed Mr. Elonis' [42] Facebook page.

Q. Okay. So you actually opened up your own account and used that as a tool in which to look at the postings that were referred to you?

A. Yes, I did.

Q. Can you please from your experience in doing that just explain a little bit about your knowledge of Facebook and how you managed to do that?

A. Yeah, Facebook is social networking. All you really need is an e-mail account and a password and you can log on. It's all free. You can post comments, messages, photos, and you can allow friends to -- you can allow the friends to come on and view your Facebook pages, or you can make your pages public in which case somebody can view your page without actually being a friend.

Q. Okay. And what was the process you went through to simply open up your personal account?

A. I got an e-mail address, a G-mail account, and I just logged in and it says, you know, first time user. I put in my e-mail address, created a password, and

you were on.

Q. Okay. And did you do this for the purpose of investigating this particular case?

A. Yes, I did.

Q. [43] And you didn't use your own, if you even had one, Facebook account?

A. Correct.

Q. Okay. As you did so how were you able to locate the Facebook account associated with the defendant in this case, Anthony Elonis?

A. There's a little block on the Facebook page that says "Find friends." You type in the person's name and it comes up.

Q. Okay. Is your understanding of becoming of a friend -- do you understand what becoming a friend means versus just being a general Facebook user?

A. Yes.

Q. Can you please explain that if you can?

A. It -- being a general Facebook user you can have your own page. You can view other people's pages who have them public. If you're a friend, sometimes if you have a Facebook page, you can just block the contents of your page specifically for your friends.

To become a friend you would request that person, you know, hey, I want to be your friend, and they would say yes and then, therefore, you could view their pages.

Q. And there has to be mutual acceptance between the two parties?

A. [44] Yes.

Q. Okay. Did you make a request or initiate any kind of contact directly with the defendant through his Facebook account during this investigation?

A. No, I never became a friend of his. All of his postings and pages were public.

Q. So essentially everything you found out through your investigation, which we'll go into more detail, you were able to access without specifically notifying the defendant or becoming his friend?

A. Correct.

* * *

[45] BY MS. STEPHAN:

Q. All right. Special Agent Stevens, do you see at least the top of that exhibit for now?

A. Yes, I do.

Q. And do you recognize what that is?

A. Yes, I do.

Q. And how do you recognize it?

A. I saw this. This posting was given to me by Dan Hall from Dorney Park and I viewed it on his Facebook -- on Anthony Elonis' Facebook page.

Q. Okay. And do you see a date and time associated with that?

A. Yes, Tuesday, October 19th, 2010 at 2:49 p.m.

Q. Reading down to the bottom there, would that be the entire of the posting that you received from Dan Hall as well as viewed yourself on Facebook?

A. Yes, it is.

MS. STEPHAN: Your Honor, at this point I'd like to move into evidence Government's Exhibit Number 1. [46] THE COURT: Any objection?

MR. COOPER: No, Your Honor.

MS. STEPHAN: I ask it be published --

THE COURT: Exhibit 1 will be admitted and may be published.

(Government's Exhibit 1, Facebook post, is admitted into evidence at this time.)

MS. STEPHAN: Thank you.

(Pause in proceedings.)

BY MS. STEPHAN:

Q. I'm going to ask you if you can, Agent Stevens, if you could read what this posting says for us. And I'll move it at the appropriate time for you.

A. It's titled, "2010 Cedar Fair Entertainment Company. "I'm going to have lots of fun writing this note. I'm ready to ditch the dirt on my termination. It's going to feel so good. Ready? I was fired from my job at Dorney Park and Wild Water Kingdom on Sunday, October 17th, 2010. The primary reason given was due to a profile picture I uploaded that same day with a caption, 'I wish.' This was a consensual photo taken during last year's Halloween Haunt.

"There is no way that these two syllables constitute a real or legitimate threat given the context of this photo. You'll need something more to [47] win an unemployment appeal. So let's discuss that, shall we? "I repeatedly stated that my status updates are rap lyrics and thus not representative of

my values, views, or beliefs. I never stated names. All characters that appear in my work are fictitious. Any resemblance to real persons, living or dead, is purely coincidental.

"I believe you are going to attempt to connect a real person to a fictitious status update that contains illegal activity, specifically 18 PA Criminal Statute Number 3129. Good luck with that.

"Keep in mind your statements will be part of the court record in the form of audio recording for which the transcript will be available and potentially disseminated online.

"Does this person really want their employer to do this? Honestly, big Tone sitting here pulling lint out of his pockets. Cedar Fair Entertainment Company's pockets are much deeper than his. My capacity to forgive knows no bounds. I sincerely wish her the best in her future lawsuit, which reminds me of my next topic.

"I was once a department supervisor. I was schooled on the importance of progressive documented [48] disciplinary action. There is none in my case. What there is is [*sic*] an impressive stack of witnesses' statements written about me. If you use this against me at the hearing, I will have access to these documents. I would love to put names to the false statements contained within them. I would have a field day with all that legitimate defamation.

"I told Anne Jones that the allegations against me were false. I told her who to investigate. Unfortunately, she's apparently too fat and lazy to do her job correctly. One need only look to piles of paperwork on her desk to see that she can't keep up

with her work load. If Cedar Fair keeps her on board after this season, they're much crazier than I. Thankfully, my opinion is protected speech.

"Just so everyone knows, I was asked to stay in park operations with the responsibility of doing scheduling and orientations. I turned this offer down, mostly because I did not want to remain in a department where most of the leadership had no values or qualifications to progress past the ride operator position. I'm talking about the people below Keith and Mindy, both of whom I have the utmost respect for.

"In the end I'm so thankful to finally be free. I gave too much of my time and effort and got [49] little to now [*sic*] respect. It's a shame because I love the park and I love the industry.

"When I stood up before you at orientation and spoke of the need to watch your water because I didn't want my children at the bottom of your pool and the need to be vigilant at your rides because I didn't want to respond to an incident where you had been seriously injured or killed, the tears in my eyes were real. There is not many employees that had the same passion and devotion that I had to that place.

"Someone once told me that I was a firecracker. Nah. I'm a nuclear bomb and Dorney Park just fucked with the timer. If I was the general manager, I'd be on the phone with Sandusky discussing a damage control plan. But I'm not and ya'll haven't heard the last of Anthony Elonis."

MS. STEPHAN: At this time, Your Honor, I'd like to show the witness Government's Exhibit Number 2, not for the jury.

THE COURT: Okay.

(Pause in proceedings.)

BY MS. STEPHAN:

Q. Special Agent Stevens, do you recognize that document?

A. Yes, I do.

[50] Q. And how do you recognize it?

A. Chief Dan Hall, Dorney Park Patrol, also provided this posting to me and I viewed it on Anthony Elonis' web -- Facebook page.

Q. Yourself?

A. Myself.

MS. STEPHAN: Your Honor, I'd like to move for the introduction of Government's Exhibit Number 2.

THE COURT: Any objection?

MR. COOPER: No, sir.

THE COURT: It will be admitted and may be shown to the jury.

(Government's Exhibit 2, Facebook post, is admitted into evidence at this time.)

MS. STEPHAN: Thank you, Your Honor.

BY MS. STEPHAN:

Q. Special Agent Stevens, would you please read this post if you could?

A. "This one needs its own disclaimer. These are fictitious lyrics and I'm only exercising my constitutional right to freedom of speech. Ready? Boom Boom Boom. You've got the towers baby, I got the planes, and the 2010 season going out with an

explosion. Static.

"We are live on the scene here at censored in [51] Allentown, Pennsylvania where what's being reported to us as a twin engine Cessna just struck the O-M-G, another one is coming in, get down. Static. Someone better Dick, yo, hurry up, quick, and preemptively activate the EAP. I thought I told ya'll motherfuckers don't fuck with me."

(Pause in proceedings.)

MS. STEPHAN: At this time, Your Honor, I'd like to show the agent Government's Exhibit Number 3 not for the jury.

(Pause in proceedings.)

BY MS. STEPHAN:

Q. Agent Stevens, did you see or do you recognize what is Government's Exhibit Number 3?

A. Yes, I do.

Q. And how do you recognize it?

A. Again, Chief Dan Hall provided me with this and I viewed it on Anthony Elonis' Facebook page.

Q. This is the third of three we've just gone through so far. Are these three that were all provided to you at the same time by Daniel Hall?

A. Yes, they were.

Q. Okay. I'm sorry, did you say you also read this on Facebook account as well?

A. Yes, I did.

[52] Q. (Inaudible)?

A. Yes.

MS. STEPHAN: Your Honor, at this time I'd like to move for the admission of Government's Exhibit Number 3.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: It will be admitted and may be shown to the jury.

(Government's Exhibit 3, Facebook post, is admitted into evidence at this time.)

BY MS. STEPHAN:

Q. Agent Stevens, could you please read this post?

A. "Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to the keys for the fucking gates, that I had sinister plans for all my friends and must have taken home a couple?

"Ya'll think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween Haunt could be so fucking scary?"

Q. Now, during the course of your investigation did you observe other threats that were made on the defendant's Facebook account?

A. [53] Yes, I did.

Q. Do you recall one being posted on or about November 7th, 2010?

A. Yes.

Q. And was that one targeting the defendant's wife, Tara Elonis?

A. Yes, it was.

MS. STEPHAN: Your Honor, I'd like to show Government's Exhibit Number 4 to the agent, not for the jury.

(Pause in proceedings.)

MS. STEPHAN: Do you --

THE COURT: What's the date on this again?

MS. STEPHAN: November 7th, 2010.

BY MS. STEPHAN:

Q. Agent Stevens, do you recognize Government's Exhibit Number 4?

A. Yes, I do.

Q. And how do you recognize it?

A. I recognize it from the Facebook page of the defendant.

Q. Is this something you personally observed yourself?

A. Yes, it is.

Q. And do you see the date, that is November 7th, 2010?

A. [54] Yes, I do.

MS. STEPHAN: At this time I'd like to introduce into evidence Government's Exhibit Number 4.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: It will be admitted.

(Government's Exhibit 4, Facebook post, is admitted into evidence at this time.)

MS. STEPHAN: May it be published to the jury, Your Honor?

THE COURT: Yes.

BY MS. STEPHAN:

Q. Agent Stevens, I'm going to ask you to read this post as well.

A. "Hi, I'm Tone Elonis. Did you know that it's illegal for me to say I want to kill my wife? It's illegal. It's indirect criminal contempt. It's one of the only sentences that I'm not allowed to say.

"Now, it's okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. I'm not actually saying it. I'm just letting you know that it's illegal for me to say that. It's kind of like a public service.

"I'm letting you know so that you don't accidentally go out and say something like that. But [55] what's interesting is that it is very illegal to say I really, really think someone out there should kill my wife. That's illegal, extremely illegal, very, very illegal, but not illegal to say 'with a mortar launcher.' That's because it's its own sentence. It's an incomplete sentence, but it may have nothing to do with the sentence before that. So that's perfectly fine, perfectly legal.

"I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like 'the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of site [*sic*] through the sun room,' insanely illegal, ridiculously, recklessly,

insanely illegal, yet even more illegal to show an illustrated diagram." And then there's a little diagram.

Q. Does it say "house" and then "cornfield" and then "getaway road"?

A. Yes.

Q. If you can pick up and read from that point?

A. "Insanely illegal, ridiculously and horribly felonious, because they will come to my house in the middle of the night and they will lock me up. Extremely against the law.

[56] One thing that is technically legal to say is that we have a group that meets Fridays at my parents' house and the password is 6 Semper Terrenous (ph)."

Q. Thank you. Other than the postings you already described, did you see any other postings on his Facebook account that you took threatening and serious?

A. Yes, I did.

MS. STEPHAN: I'd like to show Agent Stevens Government Exhibit 5, not for the jury.

(Pause in proceedings.)

BY MS. STEPHAN:

Q. Do you recognize this exhibit?

A. Yes, I do.

Q. Is it a posting also from the defendant's Facebook account?

A. Yes, it is.

Q. What is the date of this posting?

A. November 15th, 2010.

Q. And, again, you personally observed this yourself?

A. Yes, I did.

MS. STEPHAN: I'd like to move into evidence Government's Exhibit Number 5.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

[57] THE COURT: It will be admitted and may be shown to the jury.

(Government's Exhibit 5, Facebook post, is admitted into evidence at this time.)

BY MS. STEPHAN:

Q. Agent Stevens, could you please read this as well?

A. "Fold up your PFA and put it in your pocket. Is it thick enough to stop a bullet? Try to enforce an order that was improperly granted in the first place. Me thinks the judge needs an education on true threat jurisprudence. And prison time will add zeros to my settlement, which you won't see a lick, because you suck dog dick in front of children. And if worse comes to worse, I've got enough explosives to take care of the state police and the sheriff's department."

(Pause in proceedings.)

Q. During the course of your investigation -- well, actually, let me do one more. Did you see other postings on his Facebook account that you also took threatening?

A. Yes, I did.

Q. I'm going to show the Agent Government's Exhibit Number 6, not for the jury.

(Pause in proceedings.)

Q. Do you recognize Government's Exhibit Number 6?

A. [58] Yes, I do.

Q. And how do you recognize that?

A. I viewed it on the defendant's Facebook page.

Q. And is there a date to this particular post? A. November 16th, 2010.

Q. And, again, you personally observed this yourself?

A. Yes, I did.

Q. Thank you.

MS. STEPHAN: I'd like to move into evidence Government's Exhibit Number 6.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: It will be admitted and may be shown to the jury.

(Government's Exhibit 6, Facebook post, is admitted into evidence at this time.)

BY MS. STEPHAN:

Q. Agent Stevens, would you please read this post as well?

A. "That's it. I've had about enough. I'm checking out and making a name for myself. Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined. And

hell hath not [*sic*] fury like a crazy man in a kindergarten class. The only question is which one?"

[59] Q. Agent Stevens, after you viewed all of these posts on the defendant's counts and you said you took them to be threatening, did you take further action in your investigation?

A. Yes, we attempted to go interview the defendant at his residence.

Q. Okay. And could you just summarize for the jurors what happened when you went to the defendant's residence?

A. Yeah, me an [*sic*] another agent went to his residence. We knocked on the door. His father, Anthony Green, answered the door. He said that Anthony Elonis was sleeping at the time, but that he would get him up and he needed to get dressed. Me and the other agent stand--waited out on the porch for several minutes. The defendant came out. I identified myself as a special agent for the FBI. He asked if I was a law enforcement agent and I said yes, I was. He asked if he was free to go and I said yes, he was. He said thank you very much, went inside, and closed the door.

Q. Okay. Did you subsequently look at or observe the defendant's Facebook account that same day that you went to the defendant's residence?

A. Yes, I did.

[60] Q. And did you see anything on his Facebook account at that time that you considered threatening?

A. Yes, I did.

MS. STEPHAN: I'm going to show -- ask to show

the agent Government's Exhibit Number 7, not for the jury?

THE COURT: Yes.

(Pause in proceedings.)

BY MS. STEPHAN:

Q. Agent Stevens, do you recognize Government Exhibit Number 7?

A. Yes, I do.

Q. And how do you recognize it?

A. I viewed that on the defendant's Facebook page.

Q. Is there a date for this particular listing?

A. November 30th, 2010.

Q. Okay. Is that the same date you went to his residence as you just described?

A. Yes, it is.

MS. STEPHAN: At this time I move for the introduction of Government's Exhibit Number 7.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: It will be admitted.

(Government's Exhibit 7, Facebook post, is [61] admitted into evidence at this time.)

THE COURT: Can you just zoom in on that?

MS. STEPHAN: Certainly.

(Pause in proceedings.)

MS. STEPHAN: Is this published for the jury?

Thank you.

BY MS. STEPHAN:

Q. Agent Stevens, could you please read this post to the jury?

A. Yes, this one is entitled "Little Agent Lady." "You know your shit is ridiculous when you have the FBI knocking at the door. Little agent lady stood so close. Took all the strength I had not to turn the bitch ghost, pull my knife, flick my wrist, and slit her throat, leave her bleeding from her jugular in the arms of her partner. Laughter.

"So the next time you knock you best be serving a warrant and bring in S.W.A.T. and an explosives expert while you're at it, because little did ya'll know I was strapped with a bomb. Why do you think it took me so long to get dressed with no shoes on? I was just waiting for ya'll to handcuff me and pat me down, touch the detonator in my pocket and we're all going boom.

"Are the pieces coming together? Shit, I'm [62] just a crazy sociopath that gets off playing you stupid fucks like a fiddle. And if ya'll didn't hear, I'm going to be famous because I'm just an aspiring rapper who likes the attention who happens to be under investigation for terrorism, because you think I'm ready to turn the valley into Fallujah, but I ain't going to tell you which bridge is going to fall into which river or road. And if you really believe this shit, I'll have some bridge rubble to sell you tomorrow. Boom boom boom."

Q. And it's followed by a Department of Justice seal, sticker?

A. Yes, it is.

Q. And, again, you personally saw this on the defendant's Facebook page?

A. Yes, I did.

Q. Okay. After you saw this post what was the next action you took in your investigation?

A. After I saw this post then I contacted the U.S. Attorney's Office.

Q. And did you eventually apply for a search warrant to search the defendant's residence?

A. Yes, I did.

Q. And did you actually go to the defendant's residence and execute a search warrant?

[63] A. Yes, we did.

Q. Do you know about what date that was?

A. That was December 9th, 2010.

Q. All right. Do you know if a computer was seized during that search warrant execution?

A. Yes, there was.

Q. And was that computer taken from his residence?

A. It was taken from his residence.

Q. And what did you do with it?

A. I took the computer from his residence and I sent it down to our regional computer forensic lab.

Q. Now, what was the purpose of sending it there?

A. To do a forensic examination.

Q. And do you know who did that forensic examination?

A. Yeah, Steven Rowe.

Q. All right. Did you get any information while you were in the residence as to who the owner of that computer was?

A. Yes, we were told by Anthony Green, the defendant's father, that Anthony Elonis was the only one who used the computer.

Q. Okay. Now, after you viewed all the different threats in this case, can you explain to the jury in as much detail as you can, as to how you took them or how you felt after reading each and every one of them?

[64] A. Well, I was very concerned. I found them very threatening. They seemed to be escalating and getting worse with each post. The one about Dorney Park, I mean there's thousands and thousands of people that go there each day. The one with the elementary school, I myself have a kid in a local elementary school, so that was very, very concerning to me. And then the one concerning the little agent lady, I was concerned about my family because I knew that the defendant was computer savvy. I thought maybe he could find out where I lived. I told my husband to be aware. I came home, I looked around the neighborhood to make sure there was nothing suspicious.

* * *

[68] Q. Did you also have the opportunity to review postings that were made and provided to you from Facebook by the defendant in reference to whether or not his account or he knew his account was available publicly, or the posts he made on his account?

A. Yes, I did.

Q. And did you find any posts from the defendant in which he did indeed admit to his Facebook account being public?

A. Yes, I did.

[69] MS. STEPHAN: I'm going to show the agent Government's Exhibit Number 9, not for the jury. (Pause in proceedings.)

BY MS. STEPHAN:

Q. Do you recognize Government's Exhibit Number 9?

A. Yes, I do.

Q. And how do you recognize it?

A. I saw this through the information that was provided by Facebook pursuant to the search warrant.

Q. And it pertains to the defendant, Anthony Elonis?

A. Yes, it does.

Q. Now, it says a name and user ID on this Facebook account. Did you come to find out information how this relates to Anthony Elonis?

A. Yes, that user ID is to the account of Anthony Elonis. Tone Dougie was his Facebook moniker.

MS. STEPHAN: Okay. At this time I'd like to move for the admission of Government's Exhibit Number 9.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: 9 will be admitted and may be shown to the jury.

(Government's Exhibit 9, defendant's Facebook information, is admitted into evidence at this time.)

[70] BY MS. STEPHAN:

Q. (Inaudible). I'll actually ask these questions again. The author says Tone Dougie and then it has a number in brackets. Tone Dougie I think you just testified was the name used by Anthony Elonis?

A. Yes, it was.

Q. Do you know what Anthony Elonis' middle name is?

A. I'm sorry, what?

Q. Do you know what Anthony Elonis' middle name is?

A. Douglas.

Q. And the user number that you see next to his name, is that throughout every post that we've already admitted into evidence?

A. Yes, it is.

Q. And can you read the last line of this particular post?

A. "Oh, wow, my Facebook is public anyway. I could care less if people delete me."

Q. And, again, when you accessed the Facebook account you were able to access it without any special permissions provided by the defendant?

A. That's right, I was not requested as a friend. I could just go on and view it.

* * *

[71] CROSS-EXAMINATION

BY MR. COOPER:

Q. Good afternoon, Agent.

A. Good afternoon.

Q. Let me just take you back to when you went to the house. You went to the house and this was an address. How did you know to go to that particular house?

A. Department of Motor Vehicles check --

Q. Okay.

A. --provided that address.

Q. So you went there, you knocked on the door, someone else answered. He said his name was Mr. Green?

A. Yes.

Q. He represented himself as Anthony's father, is that right?

A. Correct.

Q. And he said he has to get dressed, he'll be right out?

A. Correct.

Q. And you stood outside and waited with another agent, is that true?

A. Correct.

[72] Q. And Mr. Elonis did come outside eventually, is that true?

A. Correct.

Q. And when he came outside, that would have taken what, a couple of minutes?

A. A couple of minutes, several minutes.

Q. Okay. And when he came outside, this was in December?

A. November 30th.

Q. Okay. Cold outside?

A. I believe so.

Q. I mean usually it is at that time of year.

A. Yeah, at that time.

Q. Do you remember what he had on? Did he have on any coat, shoes? What did he wear?

A. I believe jeans and a shirt, no shoes.

Q. Okay. Regular shirt and jeans?

A. Yes.

Q. Okay. And did anyone pat him down at that point?

A. No.

Q. And you introduced yourself and said I'm an agent, I'm here -- and did you say why you were there?

A. I just believe we asked if we could ask him a few questions.

Q. Did you tell him what it was about?

A. [73] No.

Q. Did you want to get inside the house?

A. No.

Q. You just wanted to question him?

A. Yes.

Q. And the questioning was about the postings?

A. Yes.

Q. Okay. And this would have been in December and this would have been after you reviewed certain postings that you saw, is that correct?

A. Correct.

* * *

[74] BY MR. COOPER:

Q. All right. So in this posting, you see to the left of where it says "2010 Cedar Fair Entertainment Company," you see that grey block there?

[75] A. Yes.

Q. Is that what you got? Is this the actual document that you got from Mr. Hall?

A. It's the same posting, yes.

Q. Okay. Well, do you see the grey square that's empty? Was there anything in it?

A. I believe there was a photo.

Q. A photograph?

A. Right.

Q. Okay. But that's not in here?

A. Right.

Q. Do you remember what the photograph was?

A. I do not.

Q. Okay. So this is not a complete picture of the Facebook, is that right, because it doesn't include whatever that grey block is.

A. It's what was written.

Q. I understand that. But the photograph is not

in there?

A. Correct.

Q. All right. There's also, if I understand Facebook correctly and maybe I don't, but when a posting is made people comment back to the posting, or not. People can choose --

A. Okay.

Q. [76] -- and say, you know, they can make a comment as to whether they like it, what they think about it, whatever, is that fair to say?

A. I believe so.

Q. Okay. And was there any commentary provided to this? Did Mr. Hall give you any of the comments that were there?

A. I don't recall.

* * *

[77] [BY MR. COOPER:] The last two sections of it, okay, talk about, "Someone once told me I was a firecracker." And then you read that there was a P there or some kind of letter. Do you know what that is? Is that an image? Do you know what that means?

A. No, I don't.

Q. Okay. Do you know about symbols that people post on Facebook as to characterize what they're saying and how they want to convey the message? Do you know that?

A. Not part -- not really.

Q. Not particularly.

A. No.

Q. Okay. That's fair enough. So as we talk today

about this particular symbol, you don't know what it means, is that true?

A. That's true.

Q. Okay. But it is part of the message that is in -- [78] written in this Facebook, is that true?

A. True.

* * *

[80] BY MR. COOPER:

Q. This also talks about a lawsuit between American Civil Liberties Union, that's ACLU, and the Pennsylvania School District over someone getting expelled from school for a song or rapper songs that were written. You see that. And that's all included in the body of this message, is that right?

A. There's -- yeah.

Q. Okay. And there's also -- it says, "Like,

"Comment, Share," you see that at the bottom, is that right?

A. I see that.

Q. Okay. And, again, if we haven't experienced with Facebook, if somebody posts anything on Facebook, people can comment on it, is that true?

A. Yeah.

[81] Q. Okay. And the comments about this were not given to you by Mr. Hall, is that true, just this page?

A. I don't believe so.

Q. Okay. Let me rephrase the question so it's clear. Did he give you anything else other than this single page with regard to this post?

A. With that post, I don't believe so.

Q. Okay. And in Government Exhibit 3 where it's talking about the moles and, "Didn't I tell you," and all these different things, it has a view -- it says, "View all 44 comments" there, do you see that?

A. Yes.

Q. Again, "View all 44 comments," is that correct to understand that there were 44 comments to this posting? Am I correct to say that?

A. I believe that's what it means.

Q. Okay. Were those comments provided to you by Mr. Hall?

A. I don't believe so.

Q. Did you ever have a chance to see the comments?

A. I don't remember seeing them.

* * *

[82] [BY MR. COOPER:] This was previously entered into as Government Exhibit 5. It says, "Hi, I'm Tone Elonis. Do you know it's illegal for me to say" -- and at the bottom here it says, "Whitest kids you know. YouTube.com "Whitest kid you know sketch." Do you see that?

A. I see that.

Q. Okay. Did you go to that link and view that?

A. No, I didn't.

Q. Okay. If someone wanted to look at that link if they saw that Facebook posting, could they connect to that link and see whatever that link was?

A. I don't know. I don't know how that works

with Facebook.

Q. All right. And as far as this particular language is concerned, this was following a protection from abuse decision against Mr. Elonis? Is that your understanding?

A. Yes.

Q. Okay. And were you part of the hearing in terms of the protection from abuse? Did you hear the evidence or --

A. No, I did not.

Q. -- view anything? Did you know anything about the background between Mr. Elonis and Tara Elonis prior to [83] viewing this Facebook posting?

A. No, I don't believe so.

Q. Okay. And so would you agree that those circumstances, those particular circumstances, are important to know?

A. No.

Q. Okay. You don't think so from looking at what this is?

A. No. He flat out said he wanted to kill his wife.

Q. I mean that's what's read here? That's the literal reading of it, is that right?

A. Yes.

Q. Okay. But as far as why it was said or what circumstances he was in or how it would be perceived as far as he was concerned, you don't have any understanding of that?

A. I knew he was upset about the protection order.

Q. Okay. But is that it? When you say he was upset about the protection order, you knew he was upset about the protection order, but as far as all the other circumstances, you're not aware of them, is that true?

A. I'm not aware of any other circumstances.

Q. All right. Now, in one of the -- in one of the comments with the school you saw that and I think that if we look at that for a second -- [84] (Pause in proceedings.)

Q. So now, this -- this posting, this was something you looked up and saw, or was that provided to you by somebody?

A. I -- both. I'm not exactly sure what happened first.

Q. Okay. But as far as Mr. Elonis being connected with the school in any way, you have no knowledge of that, is that true?

A. I don't understand what you mean.

Q. Well, was he an employee for a school district, for example?

A. No.

Q. Okay. Was he -- did he have any dealing with the school in terms of being kicked out of the school or anything like that?

A. I don't know that.

Q. Did he name any particular school in this writing?

A. No.

Q. Okay. And it's not connected to being fired,

right?

A. It doesn't mention being fired.

Q. And it's not connected to the protection from abuse, is that correct?

A. It doesn't mention anything about --

[85] Q. Okay.

A. -- the protection from abuse.

Q. It sort of just appears all by itself, is that right?

A. Yeah.

Q. And I know there was one that, you know, you read and you talked about being concerned about because it said -- it was talking about --

(Pause in proceedings.)

Q. -- agent -- agent lady. Now, my-- if I look at this, this is written after you visited the house, is that right?

A. Yes.

Q. And at the end where it -- the last two lines, it says, "If you really believe this, I'll have some bridge rubble to sell you tomorrow." Do you see that?

A. Yes.

Q. Okay. So we have all this -- all these words written, and then at the end, "If you really believe this," you see that, right?

A. Yes, I see that.

Q. That's what is written there?

A. Yes.

Q. Now, did you -- you didn't know this man

before that day you came to the house, is that right? [86] A. No.

Q. And he came out wearing jeans and a shirt, and you introduced yourself and he introduced himself and you said we would like to talk to you. Is that -- is that true?

A. Yes.

Q. Did he say about what?

A. No.

Q. He just said am I free to go?

A. Right.

Q. Okay. And you said yes, you are?

A. Yes.

Q. Okay. And he said thank you and goodbye? Is that what he said?

A. Something to the effect of thank you very much, and went in the house.

Q. Okay. So would I be correct to say that the contact that you had on that particular date was not acrimonious? I mean there wasn't -- it wasn't hostile? Is that a fair way to describe it? I wasn't there, you were.

A. It wasn't hostile.

Q. Okay. I mean you came to the house, you wanted to question him, you didn't say what it was about. You did you say you were from the FBI?

[87] A. I said -- yes. It was a very short conversation.

Q. Okay. And his response was well, am I free to go, and you said yeah. And he said okay. Thanks

and goodbye.

I mean there wasn't anything what are you doing here or any cursing or any -- anything of that nature? Is that a fair way of saying it?

A. That would be fair. There was no cursing.

Q. And that was a face-to-face type of situation, is that correct?

A. Correct.

* * *

REDIRECT EXAMINATION

BY MS. STEPHAN:

[87] Q. Agent Stevens, during the course of your investigation did you obtain the actual protection from [88] abuse order that Tara Elonis got protecting her and her children from the defendant, Anthony Elonis?

A. Yes, I did.

Q. And that was made part of your case file?

A. Yes, it was.

Q. And did you ever familiarize yourself with the terms of that protection from abuse order?

A. Yes.

Q. And during the course of your investigation did you speak to Tara Elonis as well?

A. Yes, I did.

Q. And she also provided to you some information essentially about her relationship with the defendant and her actually reading -- or her feelings regarding the threatening posts, is that correct?

A. That's correct.

Q. And did you become aware that the PFA was for a certain length of time?

A. Yes.

Q. And how long was it for?

A. I believe three years.

Q. And that was issued on or about November 4th, 2010?

A. Yes, it was.

Q. All right. And I think one of the posts -- well, [89] we certainly went over this afternoon, but Mr. Cooper asked you some questions about, that was dated November 6th, 2010, two days later?

A. Yes.

Q. From the actual PFA order being issued?

A. Yes.

Q. And, again, you obtained that actual order during your investigation?

A. Yes.

Q. Thank you. Now, the defense attorney, Mr. Cooper, asked you various questions about each of these individual threatening posts. He highlighted certain terms for you, such as "disclaimer," "fictitious." He highlighted the ACLU article.

Can you tell me, based upon your investigation in this case, how reading those things as part of these posts affected your thoughts, your fears, or the way you acted in this particular case or investigation?

A. Yes, they didn't they didn't cause me to believe they were any less threatening or that -- that he

wasn't being serious in his threats. It was just kind of like saying -- kind of saying that I know these are threats. I'm going to put this up and maybe it won't get me in trouble. But to me it made it even more [90] threatening.

Q. Okay. So you actually -- it made the threat more serious than -- with that kind of language attached to it?

A. Absolutely, yes.

Q. And do you also have the benefit in your investigation of knowing the things that were going on in defendant's life in addition to being able to reading the threats itself?

A. Yes, I knew.

Q. Like his wife leaving him and - -

A. Losing his job.

Q -- him being fired from his job and those issues?

A. Yes.

Q. Thank you. He also asked you some questions about the -- specifically about the elementary school threat. Let me put that up on the monitor.

A. Okay.

(Pause in proceedings.)

Q. Do you recall that particular one? I'm going to ask you some questions about this.

A. Yes, I do.

Q. After you saw this threat on the defendant's Facebook account did the FBI take any steps because this threat was posted?

[91] A. Yes, my supervisor notified the local police department who was then going to notify the superintendent of schools.

Q. And that would have been in the area surrounding where the defendant resides?

A. Yes, it was.

Q. And was that taken shortly after actually reading this -- this threatening post on the defendant's Facebook page?

A. Yes, it was.

* * *

APPENDIX H

[Transcript of Jury Trial – Day 2 – October 19, 2011]

* * *

[3] MS. STEPHAN: Thank you, Your Honor. I call Michael Moore.

MICHAEL MOORE, Government's Witness, Sworn.

COURTROOM DEPUTY: Please state your full name and spell your last name for the record.

THE WITNESS: Michael Moore, M-O-O-R-E-.

THE COURT: You may proceed.

MS. STEPHAN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. STEPHAN:

* * *

Q: Can you please tell me what your occupation is?

A: I'm a forensic examiner for the FBI dealing with computers and digital evidence.

* * *

[4]Q. Can you please state just what your general background is in computer forensics and the like?

A. I have hundreds of hours in computer forensics training. I hold a master's in information systems. I've spent about the last four years approximately doing computer forensic work out of the Philadelphia Regional Computer Forensics

Laboratory.

Q. Wonderful. Do you have any specific knowledge with the website or internet-based site called Facebook?

Q. And can you just explain your general knowledge base of Facebook?

A. I have general knowledge of Facebook. I've done a little research for the -- for the CART program, which is our parent program in the FBI, it's Computer Analysis Response Team. I've done a little research based on that. And also, my wife is a user of it, as are many people, and I've looked at it a little bit, so I have some general knowledge which I could share.

* * *

[BY MS. STEPHAN:] Q. [7] Could you explain to the jury just what -- what in general terms Facebook is, why people use it?

A. Facebook is just a way to communicate. It's a social networking site. It allows you to share things that you wouldn't normally be able to share, like say pictures. You know, you just take a picture of your child doing something that was interesting, maybe with a bowl of spaghetti on his head, and you want to share it with all your relatives, you take a picture of it and you share, you put it on Facebook and grandma can see what her grandchild has been up to.

So I mean things like that and you can also write about the burger you just had or you can just talk about things like politics or whatever and just share it with either your friends or, you know, the whole

world it you wanted to.

Q. And the kinds of things you just described, are those things that you see people typically using Facebook for?

A. Yes.

Q. That is the common use for it that you've noticed?

A. The common use for it is basically -- I guess it's an extended way to communicate and, you know, maybe extend friendships and things like that.

* * *

[BY MS. STEPHAN:] Q. [10] Now, you had mentioned finding friends and other descriptions of adding friends to your Facebook account. Could you explain in more detail what you mean by friends and by adding friends?

A. A friend is someone you basically give access to your account. You know, it's someone that you confirm is someone you know and someone you want to share your ideas and your information. So you -- so when you look -- look say -- this offers you a lot of ways to find it.

Facebook can go through your e-mail and actually find people who sent you e-mail and make them your friends automatically if you have G-mail or a couple other types of e-mail. You know, it could also do a bunch of other different ways for you to find friends.

You can actually do a name search for someone you know you might not have seen in ten years and then add them as -- and then add them as a friend. And then [11] they confirm that you're a friend and they know you, and then you two have that

relationship where you can see other's information.

Q. Okay. Now, you say when you confirm a friend, is there some kind of mutual agreement going on to become another user, Facebook user's friend?

A. In a sense. I mean it's basically you're saying that, you know, this person says you're a friend and you get a request saying this person wants to be your friend, and you can either say yes or no.

So if you don't know this person, you would say no and then that relationship would be terminated. And if you say yes, then you would have access to your information that you provide to your friends, which most of the time is pretty much everything you post.

Q. Okay. And "friends" is the terminology that Facebook gives that particular aspect of their internet site?

A. Yes, it is.

Q. So people could have people on there that may be co-workers or may be relatives or may be friends?

A. Exactly.

Q. It's just a general terminology?

A. Exactly. It's a general term for anybody you'd like to -- like to share your information with in that [12] site.

Q. Do you know if there's a limit to the number of people you can designate as friends?

A. I do -- I haven't heard of it. I mean there's people who are celebrities with tens of millions so --

Q. Very good. I'm going to show you page three of Exhibit Number 10. Can you please explain what the

jurors are seeing on this page?

A. This is what we were discussing before about finding friends and adding friends, inviting friends. I mean this is all -- this is all the methodology which you can use to, you know, expand your -- the people who have access to your Facebook.

You can -- you can find people through all these various things here, like Yahoo, AOL, Comcast, you know, all these e-mails. You can actually export your e-mails and it parts through it, that means it looks through it, and it finds names and e-mail addresses that Facebook already knows, and it'll say hey, you know this person, you've talked to them on your e-mail, do you want to make them your friend? And it makes it that easy for you.

Q. Now, the things that we're seeing on the right side, essentially all of this, is that something that's put on through Facebook or by the user itself?

A. [13] That's done by Facebook. The bottom right portion there is actually -- that's sponsors so that's just advertisements per se, and that's part of the actually how Facebook is funded is through advertising and things like that.

On the top right is a friend finder, and that's just an automatic way to find friends. So it's an automated system.

Q. You're talking about right there?

A. Yeah, right below -- yeah, right below that too.

Q. Oh, I'm sorry, right here?

A. Yeah.

Q. Okay. Okay, I'm going to show you page four

of Government's Exhibit Number 10. Can you please explain to the jury what this page is showing?

A. This is a message from -- from someone talking to this individual, Dee Dee Stevens, just looking to see if that's -- if they know this person or not.

Q. And can you please explain how these messages work? What concept is that?

A. That's similar to like a -- like a chat message or similar to a text message where you just -- you can just send someone a message based on their -- but the Facebook is the media, so you have to log in to the site and go in and type it and then someone else has to [14] be in Facebook to receive it. So it's all entirely through Facebook.

Q. And is that targeted at just one specific person instead of a group of people?

A. That particular message seems to be targeted at one particular person.

Q. Okay. I'm going to show you page five of Government's Exhibit 10. And can you please explain to the jurors what they're seeing on this document?

A. This is what they called status. It's just like a - think of it as a wall or maybe as a chalkboard that, you know, if you're -- you can write something there and leave it up there and then people can -- if somebody walks by can write something on it too, you know, and comment on it. You know, so you write what's on your mind. You can -- you can say, you know, I had a bad day. And then maybe your friends will say hang in there and they'll reply to it. And it's open either to your friends or it could be

open to everybody if you have an open Facebook account that shares all your status and everything with everybody.

Your status is basically like this what you're doing today, what you're doing right now, what did you have for lunch, you know, what did you just see on TV? I mean it's -- it could be anything that you [15] want to write up there.

Q. And are the things that you've talked about, are those the things you've seen other people posting through their status?

A. Yes, that's typical examples of what people use that for.

Q. And can you please explain if a user of Facebook goes onto their account, they go to this status area, they post something on there --

A. Uh huh.

Q. "I'm about to eat dinner," "I'm about to go out to dinner," whatever the post may be, when they write that in or basically enter it or send it how long does it take to appear on their Facebook account or the Facebook account of their friends?

A. If they're logged in, almost instantaneously. I mean it's a matter of a second or so, so --

Q. And that is basically distributed to whomever their friend base is?

A. Whomever they're friends with, you know, whoever has access to it through the Internet throughout the world.

Q. Okay. Do you know if there's a difference on Facebook between making something private and

making something public?

[16] A. Yeah, they have a number of security settings.

They change quite a bit, but they still allow you to allow things to be seen by everyone who has Facebook or just, you know, your friends. You can bring it down to just your friends or maybe a subgroup of friends or all the way up to everyone who has access to Facebook.

Q. Okay. And the user of the Facebook account makes that choice in setting up their account or their friends or that particular post?

A. Yes, they do.

Q. All right. And I'm sorry, you said that you can designate it for just your friends, meaning your entire list of friends, a subset of that, of your friend list, or make it completely public, which means anybody who uses Facebook could have access to that?

A. Yes, to -- yeah, basically that's what it boils down to. They do have a few other settings that are new. They constantly change them. But the two things do remain that you can share things with your friends only or with everyone. You know, those two have pretty much been a constant throughout all the changes they made.

Q. Very good. And if I could just point your attention here. This would be essentially the box that a user would go to and type in whatever message they [17] wanted to communicate?

A. Yeah, that box essentially is where you'd enter, you know, what's on your mind, so literally

what's on your mind? You know, what did you have for breakfast?

You know, that's -- you can type whatever you want there.

Q. And you mentioned that people have the opportunity to comment on that, directly back on the person who's posting that message's Facebook account, is that correct?

A. That's correct.

Q. All right. So anybody who sees that person who posted it's account would also see the comments that are there?

A. That's correct.

Q. All right. And if there were comments, would they appear kind of in this area right under the status post?

A. Yes, you'd have the post and then you'd have a comment underneath it that would basically, you know, give someone else's opinion on it, you know, so they would reply and say oh, nice picture, or something like that, and people could actually do other things like "like" it. They give it a thumbs up or a thumbs down whether they like it or not. I mean there's a few [18] other options. I mean it's a pretty thorough means to communicate.

Q. Okay. Can you set -- can somebody set their Facebook account to say if so and so posts a message, I want to know that that message has been posted and get alerts to that effect?

A. I'm not particularly aware of an alert for a specific person, but I know if you have them as your friend and they're in your newsfeed, then you will

get that popping up automatically ---

Q. Okay.

A. -- on a list. So it might not alert you to a particular person, but it will pop up in a list of other things that other people have posted.

Q. All right. And can you have, as a user, set your Facebook account to automatically see what somebody else is posting if they're your friend on your own personal Facebook account?

A. Oh, if someone replies to your post? Yes, you'll see that. You'll see that as soon as you log in because they'll --

Q. Okay, onto yours.

A. -- reply right to your status. If you type something and someone replies to it, you'll see it right on it -- right next --

[19] Q. Okay.

A. -- right below it actually. Sorry.

Q. And when these posts are made do -- is the post independent, meaning that they type it in, maybe any comments are attached, and then any other additional separate posts appear some place else, or is this more of a continuous strain?

A. Well, if you start with one comment, it goes in a stream. You have to start a new post in order to have another stream of responses to it.

Q. If I were to post something today saying, you know, I'm going to the park and then I log on to my-- and some people respond to me saying have fun, enjoy, and then I go on tomorrow saying I'm going to the mall and people, you know, respond to me saying

don't spend too much, are those things all -- can you see those all basically at the same time in a running list?

A. You can see them, yeah, but you'll see things in between as well if there's anything in between there. But depending on how you have it set up, you -- if you look at just your wall, you'll just see that -- your warll [*sic*] being that chalkboard where you write what you want and your friends write with -- write the replies to you, then you would see that in that order, yes.

Q. Okay. So it's not like you have to click on [20] different pages through Facebook to see the continuing progress or basically separate dates

A. No, you don't.

Q. -- and what's occurring over dates and time?

A. Yeah, from --

Q. It's like a running timeline?

A. Right, from your standpoint it would be -- right, from soonest to latest going from top to bottom.

Q. The most recent being on top and as you scroll down they get to the older posts?

A. Correct.

Q. Okay. And I'm going to show you page six of Government's Exhibit 10. And can you please explain to the jurors what they're seeing on this page?

A. Well, it's a -- it's an event function of Facebook. It's like a calendar. You can put things in there like, you know, birthdays or if you have say a

barbecue or something and you want to have a bunch of Facebook friends you want to invite, you can put it as an event and you can ask them if they want to put it in their calendar so Facebook will remind them oh, come to the barbecue on Saturday. So -- or things like that. So it's, you know, it's a calender [*sic*] that's also connected to all your friends. So it's pretty powerful in that respect.

[21] Q. Over on the side of a lot of those screens there's a section there that has a tab for notes. Can you please explain what that is?

A. I believe that's just something where you can jot things down. I don't believe that's for -- that's for sharing things. I'm not -- I'm not really familiar with the notes part of it because it's not really something that we see too much.

Q. That you don't personally see too much?

A. Yeah.

Q. Okay.

MS. STEPHAN: Thank you. I have no further questions at this time, Your Honor.

THE COURT: Mr. Cooper.

MR. COOPER: Thank you, Your Honor.

(Pause in proceedings.)

CROSS-EXAMINATION

BY MR. COOPER:

Q. Good morning, sir.

A. Good morning.

Q. How long have you been involved with doing research on Facebook?

A. Only since late-2010.

Q. Okay. Late-2010?

A. Yes.

Q. [22] So almost a year --

A. Yes.

Q. -- as we speak today, is that right?

A. That's about right.

Q. And before you started doing research on Facebook you'd heard of it, of course?

A. Uh huh.

Q. And you had used it, of course?

A. Uh huh.

Q. And your wife had used it, of course?

A. Yes.

Q. And if I understand it right, this medium, this social medium that we're talking about here, this Facebook, says people can have conversations with other people and express either what they're doing, their thoughts, how they feel, pretty much anything they want to write, is that correct?

A. That's correct.

Q. There's no restriction as to what you can post, is that true?

A. They -- I believe there are some restrictions about things that are considered I guess, you know, socially unacceptable like pornography and things like that.

Q. Okay. So there -- they won't accept those types of -- Facebook itself will not allow those types of [23]

postings, is that right?

A. If it's posted, they generally tend to take things like that down, yes.

Q. Okay. So they can -- Facebook themselves, the company, can come in and wipe it off?

A. They -- they have done it in the past.

Q. Okay. And they have the ability, Facebook, to see what people are posting by their user account number? Is that how they find out?

A. I don't know how their internal workings go, but I'm assuming they would.

Q. Okay. Let's talk about if I'm a -- if I'm a user of Facebook and you're a user of Facebook, let's just say hypothetically that's what's going on, okay?

A. Uh huh.

Q. And you're posting messages, thoughts, communications, about whatever is going on in your life. You're posting those things. And I'm a friend, okay? I'm one of your friends.

A. Uh huh.

Q. The way I understand it is I have a newsfeed that will tell me what you're saying, and if I want to look further, I can look further, is that true?

A. If I post -- if I post that as my status, yes, you would be able to see that.

[24] Q. Okay. And if I'm not a friend, if I'm not a friend, then I won't see that on a newsfeed, is that true?

A. That's true.

Q. Okay. If I am going to see it and I'm not a friend, I have to look it up?

A. Yes, you'd have to go to that -- you have to go to my site and I'd have to have it shared with people who aren't my friends as well. And --

Q. Okay.

A. -- and you'd have to take that step and go look at my Facebook site.

Q. Okay. And taking the step to look at the Facebook site means that there's a place where you can type in a user name or type in name or search it for what that person may have posted. Am I correct to say that?

A. Yeah, that's correct. You can search by a person's first and last name and you can look at all the people with that name and you could click on that and you could come to their Facebook site.

Q. Okay.

A. If they have it shared, you'll see what they posted.

Q. It would be fair to say if I didn't want to see what you have posted and I'm not your friend, then I [25] won't see it unless I search for it, is that true?

A. Yeah, that's true. You'd have to look for it. You'd have to take an extra step to actually look for that person's post.

Q. Okay. Now, postings themselves, I want to ask you about that. The prosecutor was asking you about postings about what people post on Facebook through their messages and on the comments and things like that.

A. Uh huh.

Q. You've probably seen in your research people who have posted things and have put links connected to the postings, is that true?

A. Yes.

Q. And when I say a link connected to the posting, that means that the link appears next to the posted message and anyone who is reviewing that message can click onto that link to see if it is related to the message. Is that a fair way of saying it?

A. Yes, they can.

Q. Okay. There's also postings that are done where disclaimers are put on them, is that true?

A. I haven't seen many, but I can't imagine there wouldn't be.

Q. Okay. And a disclaimer would be something that the [26] user would enter into the wall -- onto the wall, is that true?

A. I guess. I mean I've never seen anybody do something like that but --

Q. Okay. Have you ever reviewed any of the evidence in this case?

A. No, I have not.

* * *

[BY MR. COOPER:] [27] Q. Okay. And people post all kinds of things like lyrics. You've seen that, right?

A. Yeah.

Q. Songs?

A. Yeah, people post -- yeah, things they're

interested in. I mean people who are interested in [28] music will post things like that, yes.

Q. Okay. And they will post that and share that with people who they think are interested in it as well, is that correct?

A. Yes.

Q. And they will post these lyrics to show people that they're interested in it, is that correct?

A. Well, I'm sure people could do that, yeah.

Q. Okay.

A. I mean -- and they will -- they'll share -- people share all kinds of things, yeah.

Q. Yeah. I mean the question is you've seen that in your research, right?

A. Well, I've seen -- I've seen it also in my -- in my work as well. I mean people do share things. And I've seen it also in my wife's use of Facebook. You know, people -- you know, I mean they say things, you know, things on the internet, you know, they just become viral. You know, one person likes it, two, then four, then it goes on and on so --

Q. Right. And people say things pretty much without restriction other than the restriction that you just described to us earlier where they're posting pornography --

A. Yeah.

Q. [29] -- or things like that?

A. I mean they -- right, I mean they also have a methodology by which you can report something as offense or something and they can pull it down like most internet-based companies do.

Q. Right.

A. So -- yeah, but based on that, yes.

Q. Okay. And lastly, the -- blocking. Are you familiar with that term?

A. Blockig? [*sic*]

Q. Yes.

A. Yeah, in many senses.

Q. Okay. If I said the term "blocking," would that mean that if I'm a user and there's a name or a person or a company or any pseudonym for that name, whatever they're using to post on their -- on their wall, I can block that from my Facebook account, am I correct to say that?

A. If you have -- yeah, there's a couple methodology by which you can do it, but yeah, you can -- you can just first, not choose to look at it. Or if it's someone you want to keep them as your friend, you can choose to not have their status go into your newsfeed too as well. There's a -- they've changed the settings as far as like all these security settings a number of [30] times. So there's a -- there's a few different ways you can do it depending on which time frame you're talking about.

Q. Okay. I mean generally speaking with the way that technology is always evolving, it changes all the time. But the basic principle is you put on there without restriction other than what you describe, correct?

A. Yeah.

Q. You can?

A. You can, yes.

Q. You can choose to look at it or not look at it, correct?

A. Yeah, you can choose, yep.

Q. You can choose to receive it or not receive it if you're a friend?

A. That's correct.

Q. And the -- among the topics that are posted-- that people post as far as what you've seen in your research would not only be conversations about what you're doing today or what you're doing tomorrow, but how you're feeling, how you're thinking, what songs you're interested in, what you're writing, anything you're expressing in your own way. Is that a fair statement?

A. Yeah, that's a fair statement.

* * *

[31] REDIRECT EXAMINATION

BY MS. STEPHAN:

* * *

Q. With millions and millions of users of Facebook [32] around the world, let me ask you this, do you think that Facebook has millions of personnel assigned or working for their company?

A. No, they don't.

Q. Okay. And their company is based out of California?

A. Yes, it is.

THE COURT: Any recross?

RECROSS EXAMINATION

Q. Just to back track, if anyone is complaining about what they're seeing on Facebook, they can alert Facebook to it, is that true?

A. That's correct.

APPENDIX I

[Transcript of Jury Trial – Day 2 – October 19, 2011]

* * *

[32] COURTROOM DEPUTY: Please state your full name for the record and spell your last name.

THE WITNESS: Daniel M. Hall, H-A-L-L.

[33] COURTROOM DEPUTY: Thank you.

THE COURT: All right, Ms. Stephan.

MS. STEPHAN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. STEPHAN:

Q. Good morning, Mr. Hall. Could you please tell the jury where you're employed?

A. Yes. Good morning. I'm employed for [*sic*] Dorney Park and Wild Water Kingdom.

Q. And what is your title or role their?

A. I'm the chief of patrol.

Q And how long --

THE COURT: I'm sorry, chief --

THE WITNESS: I'm sorry?

THE COURT: What's your role again?

THE WITNESS: Chief of patrol.

THE COURT: Chief of patrol. Thank you.

BY MS. STEPHAN:

Q. How long have you been employed in that capacity at Dorney Park?

A. For five years.

Q. And were you employed at Dorney Park prior to that date in other capacities?

A. I was.

Q. And what is your total length of time working for [34] Dorney Park?

A. This will be my thirteenth season.

Q. And in your capacity as chief of patrol of Dorney Park, can you please explain in more detail what that entails?

A. Yeah, basically it's overseeing the operations of the security department, which also encompasses communication center, lost and found, property office, and any other realm that would be under security or patrol.

Q. Okay. And how many people do you have under your supervision?

A. Approximately, at any given time, a hundred and twenty-five.

Q. Okay. So you are basically in charge of all of the security for every part of the park itself?

A. That is correct.

Q. All right. And I'm sorry. You said you've been doing that for five years?

A. That is correct, in that capacity.

Q. In that capacity, right. Do you know the defendant in this case, Anthony Elonis?

A. I do.

Q. And how do you know him?

A. He worked directly for my department.

[35] Q. And do you know approximately what period of time that was?

A. He worked for my department for approximately three months.

Q. All right. And prior to that do you know whether or not he was employed by Dorney Park?

A. He was.

Q. And in what capacity, if you know?

A. He worked for the operations department.

Q. All right. Let me first start with the operations department. If you are aware, can you please explain what role the defendant, Anthony Elonis, had in that capacity?

A. At the last I knew prior to him coming over to my department he was an operation supervisor to the operations department.

Q. And what would that role entail at the park?

A. An area supervisor basically takes an area of the park or a specific amount of rides and he supervises the employees that operate those rides and do various job functions within that particular area.

Q. Okay. So during that role he would be free to essentially roam the park for the areas of the rides where he may supervise?

A. That is correct.

[36] Q. All right. And I'm sorry. You said that he worked in your deparment [*sic*] for about three months in the communications center?

A. That is correct.

Q. Can you please explain in more detail what that particular job entailed?

A. Yeah, he was a communications technician. He received incoming calls to the communications center. He dispatched units to those specific calls. In addition, he may have functioned in the property office where we hand out keys and radios and/or worked in lost and found, which also falls under our department, just taking guests' comments/concerns in reference to lost items in the park.

Q. Okay. And can you please explain the communications. What exactly, if you could be a little bit more specific, somebody's role in the communication center, dispatch and things like that they would have to do?

A. Sure, if an incoming call comes in for either a ride down or an emergency in the park, he would take that information and put it into a computerated distpatch system, and then he would -- depending on which realm he was in in the communication center, he would dispatch units out over the radio, whether it be [37] an operations unit if it's a ride down or patrol unit if it was a security-related call or an EMS unit if it was a medically-related call.

Q. Okay. And does he have access to cameras that basically show what's going on throughout different parts of the park?

A. Yes, the park does have a CC TV system, and the communication center is -- the monitors for that system are in the communication center.

Q. Okay. And what if he had had the opportunity

to be able to control to a certain degree what those -- you said the cameras throughout the park were actually recording or viewing?

A. Yes.

Q. All right. How many people were in the

communications department at any giving time doing this?

A. In the communications center?

Q. Yes.

A. Anyone between three and five people at any given time.

Q. Okay. Basically doing a similar job that he's doing?

A. That is correct.

Q. All right. From the position and the operations [38] supervision to position in the communication center, would that be considered a promotion or a demotion?

A. It would probably be a demotion. He was not a supervisor in my department.

Q. Okay. And so he didn't have control over any other employee at that point in time?

A. That is correct.

Q. And he would have prior to joining your particular communications center group?

A. That is correct.

Q. All right. Do you have any knowledge as to why he left the operations department and came to your department under your employ?

A. He left the operations department and/or on around June 23rd. He himself requested a leave of absence for family reasons. He returned to the park on July 1st and that is when he joined our department and requested to be in the communications center.

Q. Do you know if that was by his choice to come to your department, or did Dorney Park take him out of the operations supervisor capacity?

A. To the best of my knowledge, it was at his request.

Q. Okay.

THE COURT: Is this June 23rd, 2010?

THE WITNESS: That is correct.

BY MS. STEPHAN:

[39] Q. Did you have occasion to have direct contact with him where he shared personal things going on in his life?

A. I had visited the communications center usually on a daily basis when I am on shift, and Anthony had often said to me in reference to the problems he was having domestically with his wife and his kids. Other communications supervisors had indicated to me that he shared information with them about the same.

Q. Okay. Did you ever see him physically upset?

A. I have, yes.

Q. And on one occasion or more than one occasion?

A. On more than one occasion.

Q. Okay. Would it be a frequent occurrence?

A. I wouldn't say frequent, but I didn't see him every shift he worked, didn't have real direct dealings with him, just when I visited the communications center.

Q. Okay. Now, at some point in time he was fired from Dorney Park. Are you aware of that?

A. I am.

Q. Okay. I'm going to show you Government's Exhibit Number 11, not for the jury.

(Pause in proceedings.)

Q. Do you recognize what's depicted in that photo?

[40] A. I have seen the photo before, yes.

Q Okay. And are you aware of who's depicted in the photo?

A. Yes.

Q. Okay. And actually this was a document that you yourself personally provided to the Federal Bureau of Investigation?

A. That is correct.

Q. Okay. And this is something that came from the defendant in this case, Anthony Elonis', Facebook account?

A. That is correct.

Q. Okay.

MS. STEPHAN: Your Honor, at this time I'd like to move for the admission of Government's Exhibit Number 11.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: It will be admitted.

(Government's Exhibit 11, Facebook photo, is admitted into evidence at this time.)

MS. STEPHAN: I ask that it be published?

THE COURT: It may be published.

BY MS. STEPHAN:

Q. Okay. Can you tell us in the picture who are the [41] people depicted? I realize they're in costume, but if you can tell us if you know.

A. Yeah, on the left in the face mask is Mr. Elonis and on the right is another operations employee by the name of Amber.

Q. Would that be Amber Morrissey?

A. Yes, I was going to say I didn't recall her last name until you had just mentioned it.

Q. Okay, very good. And do you see down at the bottom here -- and let me zoom out a little bit.

(Pause in proceedings.)

Q. Do you see right there?

A. The red circle, yes.

Q. And what does it say in the red circle?

A. It says "I wish."

Q. And that was part of this particular Facebook posting when you observed it?

A. That is correct.

(Pause in proceedings.)

Q. Can you please explain for me your knowledge of Facebook use among the staff of Dorney Park?

A. Facebook is a very common thing around Dorney Park. It seems at [*sic*] though when you get a friend request from another staff member you kind of just accept it. It's just a work-related thing that they're using. As a [42] matter of fact, we even have a Facebook page now at Dorney Park that all of the staff become part of.

So generally when you get a friend request from another Dorney Park employee, you know, it shows, especially if they've posted that they work at Dorney Park, and you accept it. It's just the common thing to do. And then you can communicate back and forth with them and --

Q. Okay.

A. -- share things in reference to your daily activities at the park with them.

Q. Okay, very good. And were you actually a Facebook user yourself?

A. I was.

Q. And were you a so-called what Facebook's terminology uses "friend" on the defendant, Anthony

Elonis', Facebook account?

A. I was.

Q. So essentially you had access to his public and private postings and he had access to yours?

A. That is correct.

Q. All right.

MS. STEPHAN: I'd like to show the defendant

Government's Exhibit Number 8. It's already been admitted and published, if I may.

[43] THE COURT: All right. Very wel. [*sic*] (Pause in proceedings.)

BY MS. STEPHAN:

Q. Okay. Did you have occasion to review this exhibit prior to sitting in court today?

A. I did.

Q. Okay. And it's actually two pages, so I'm going to put the second page in front of you as well.

A. Okay.

(Pause in proceedings.)

Q. Okay. And you see the second page as well?

A. I do.

Q. And actually, I want the first page up. Would it be fair to say that your name is right there?

A. It would be fair to say that.

Q. And that's basically associated with your Facebook user ID?

A. That is correct.

Q. Okay. And did you have the opportunity prior to today to go through the list of names that are on this particular exhibit in more detail?

A. I did.

Q. And as you understand, this is basically a list of and already been admitted as a list of the defendant, Anthony Elonis', Facebook friends. Can you tell me [44] if -- during your review of this particular list if there are other Dorney Park

employees besides yourself that appear on this list?

A. There are.

Q. And did you have the ability to count approximately how many?

A. I recognize approximately 75 that were other Dorney Park employees on the list.

Q. So 75 that you personally recognized?

A. That is correct.

Q. Would it fair to say there's possible more that you may not know their names off hand or directly?

A. Absolutely.

Q. Thank you. Now going back to that particular photograph, Government's Exhibit Number 11, which was already admitted, do you know if that was in part the cause of the defendant's termination from Dorney Park?

A. I would have to say in part, yes.

Q. There were other reasons in addition to that. Do you know if defendant's -- well, let me ask you this. On this particular exhibit, if you look --

(Pause in proceedings.)

Q. Do you see a date where I just circled?

A. Yes, ma'am, it says October 17th.

Q. And was the defendant fired on October 17th of [45] 2010?

A. He was.

Q. Thank you. Okay. Do you have occasion during your time as chief of Dorney Park Patrol to view other posts the defendant made on his Facebook

page?

A. I did, yes.

Q. All right. I'm going to go through a series of those with you now.

A. Okay.

Q. I'm going to show you Government's Exhibit Number 1, which was previously admitted and published to the jury. Do you recognize what you see in that document?

A. I do.

Q. Is this something that you personally saw on the defendant's Facebook account?

A. Yes, it was.

Q. And there's a date on this at the top. It's dated October 19th, 2010. Is that accurate?

A. That is correct.

Q. Would that be two days after the defendant was fired from Dorney Park in part based upon the photo we just showed?

A. Yes, it would.

Q. All right. And did you read this thing at length on or about that date on October 19th, 2010?

[46] A. Yes, I did.

Q. And could you read the last two lines for me specifically? Let me zoom in for you.

(Pause in proceedings.)

Q. Can you see that okay?

A. I can.

Q. Can you read those last two lines for me?

A. Yes, ma'am. "If I was the general manager, I'd be on the phone with Sandusky discussing a damage control plan. But I'm not, and ya'll haven't heard the last of Anthony Elonis."

Q. Okay. And the one before that. Sorry.

A. That's okay.

Q. Okay.

A. "Someone once told me that I was a firecracker. Nah. I'm a nuclear bomb and Dorney Park just fucked with the timer."

Q. Okay. So you received that information on or about October 19th, 2010?

A. That is correct.

Q. And after you saw that particular post can you please tell me how you felt, what you thought, what your reaction was?

A. It raised great concern with me due to my position at the park. I took this into the general manager's [47] office, also director of human resources, and started to kind of think in my own my mind what we needed to do to start to take some preventative measures and make our staff aware of the situation and what we needed to do from here. It did raise great concern though.

Q. Okay. And there's a term in there referred to "be on the phone with Sandusky."

A. Yes.

Q. Does Sandusky have any specific meaning to Dorney Park?

A. Yes, it does.

Q. And can you explain?

A. Yeah, Sandusky is where our corporate headquarters is located. Dorney Park and Wild Water Kingdom is owned by Cedar Fair, Incoporated, which is based out of Sandusky, Ohio where our corporate park Ceder Point is located.

Q. Okay. And it's Cedar Fair, Incorporated is basically the corporate name?

A. That is correct.

Q. All right. I'm going to show you what's been marked Government Exhibit Number 2, previously admitted and published.

(Pause in proceedings.)

Q. Okay. Do you remember seeing this particular post?

[48] A. Yes.

Q. And would it be fair this post is dated October 20th, 2010?

A. That is correct.

Q. And would you have seen it on or about that same date?

A. On or about.

Q. Okay. And can you please read for us what you would have read at that time? Just the first paragraph is fine for right now.

A. "These are fictitious lyrics and I am only exercising my constitutional right to freedom of speech. Ready? Boom boom boom. You got the towers, baby, I got the plane, and the 2010 season going out with an explosion. Static. We are live on

the scene here at Allentown, Pennsylvania where it is being reported to us a twin engine Sesta just struck the Oh my God -- or OMG," I'm sorry. "Another one is coming in. Get down. Static. Someone better tell Dick Gill, hurry up, quickly, and preemptively activate the EAP. I thought I told you motherfuckers don't fuck with me."

Q. Okay. And did you also see this on the defendant, Anthony Elonis' Facebook pages?

A. I did.

[49] Q. I'm going to show you Government's Exhibit Number 3, previously admitted and published. Do you recognize what's in Government's Exhibit Number 3?

A. I do.

Q. And is that also another post that you observed personally?

A. Yes, it is.

Q. And is that also dated October 22nd, 2010?

A. Yes, it is.

Q. And this is roughly, if my math is approximately correct -- the 22nd. So we have like five days after he was terminated?

A. That is correct.

Q. Sorry. Okay.

A. It's okay.

Q. And the prior post was on the 20th, so we're talking about three days after his termination?

A. Correct.

Q. Okay. And, again, you saw this one on or

about October 22nd of the time it was posted?

A. On or about.

Q. All right. Could you please read this one for us?

A. "Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have [50] taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?"

Q. Okay. Now, after you saw all three of these exhibits within five days of him being terminated based upon in part the prior Facebook post, can you tell us what your reaction was or how you were feeling?

A. Yeah, I was extremely concerned at this point, especially after seeing this particular post with keys to the park being so accessible to someone that was in Mr. Elonis' position. And with it being Halloween Haunt, and he is absolutely correct, it's extermely [*sic*] dark in the park. All of our employees and a lot of our associates are in costume at this point in time. Anybody with keys to any gate could very easily sneak into one of those locked gates in costume and we'd never know one person from an actual employee.

Q. Okay. Can you please explain -- you gave a little bit. Can you please explain a little bit more of what Halloween Haunt is?

A. Yeah, Halloween Haunt is basically we

tranform the park into a haunted attraction. This year we have thirteen haunted attractions. Last year we had twelve [51] haunted attractions. Basically we put gels over top of all the lights, so the park is very dark. In certain areas you can't see your hand in front of your face so to speak. There is fog throughout the park and most of our employees that are around the midways and working in the haunted attractions are in costume from head to toe and you don't -- you wouldn't know if it was an employee or another guest that snuck in in costume.

Q. Okay. Can you please explain how your gates are structured vers [*sic*] -- employee versus general admission, that kind of concept?

A. Correct. Yes, I can. We have 72 perimeter gates throughout the park. Six of those are guest entrance gates, which are up in our main turnstyles, and they are staffed by admissions attendants, and you either need to scan your ticket and/or if you're coming in as a guest -- as an employee, you need to scan your employee ID to get into those gates.

If you're a specific -- excuse me, a specific employee coming into work that day, you come in through an employee entrance which is manned by a patrol officer, and your ID will need to be scanned to get into that gate and allow admission into the park for work. Even if you are in costume, you still need to scan your ID.

[52] Q. Okay.

A. Those other 70 gates are not manned. Some of them are in back wooded areas where it's just the park perimeter where it's a fence lined with just a gate in it in the event that maintenance staff or

someone would need to get in there for lawn care maintenance or whatever.

Q. Okay. And they're kept locked? You need a key for them?

A. That is correct.

Q. Okay. The gates in which employees can come and go, are they self-admitting into the park or is there a security officer or park patrol officer who is at each of those employee entrances?

A. No, each of the employee entrances have a patrol officer that's there and your ID needs to be scanned by that patrol officer.

Q. Okay. So the patrol officer will actually take your ID and scan it at those gates?

A. That is correct.

Q. Okay. And then the general admission area itself as well, are there any patrol officers that stand at the general admission area?

A. There usually is one or two patrol officers that are assigned to that area, but as far as scanning the [53] tickets and/or the guest passes, it's admissions employees.

Q. Okay. So at the Halloween Haunt the employees basically come to work in costume?

A. They come -- they come to work not in costume, but then they are outfitted in a costuming area by the park --

Q. I see.

A. -- prior to entering the park perimeter.

Q. Okay. Do any of the employees sometimes

come to the park in costume already or they get dressed while they're at the park?

A. No, they get dressed --

Q. Okay.

A. -- while they're at the park in a specific Haunt-prep area.

Q. Okay. And you said the park itself at that point in time is very dark?

A. It is very dark.

Q. In fact, Halloween Haunt is going on right now at Dorney Park?

A. That is correct.

Q. All right. After you read the three posts that we just talked about did you do anything or take any precautions as chief of park patrol at Dorney Park? [54] A. We did, yes.

Q. What did you do?

A. I made my officers aware of the situation. We put a general memorandum out and a briefing note out to all of our officers when they came in for their shift at their briefing assignment and in the property office when they get their keys and radios for the day to make them aware of the situation, the reason, you know, termination of Mr. Elonis, and some of the threats that he had posed against the park, and that we should do our best. If anybody sees him, he should be detained, and, you know, the command officer should be contacted so we can take the appropriate action.

Q. Okay. And so anybody who would be sending any of those manned gates or the admissions center,

those patrol officers would have known to look out for him coming in any of those areas?

A. That is correct.

Q. All right. And did you notify law enforcement at any point in time?

A. I did notify law enforcement. I don't remember the exact date that I notified the FBI. Actually, I started off by notifying the South Whitehall Township Police.

Q. Okay.

[55] A. And I showed them a few of these posts. I think that this may have even been one of them. And he said he was going to what -- you know, if there was anything that his department could do.

Q. Okay. And would that have been Corporal Negran?

A. It would have been, yes.

Q. And did you come to learn that Corporal Negran did contact the defendant by telephone --

A. I did.

Q. -- or at least attempted to?

MR. COOPER: Objection, Your Honor. He --

objection.

THE COURT: What's the objection, to hearsay?
MR. COOPER: Calls for hearsay.

THE COURT: We're not talking about the content of this conversation, so --

MS. STEPHAN: No, and I'm not asking.

THE COURT: -- I'll overrule the objection.

BY MS. STEPHAN:

Q. So you know whether or not he actually made a phone call? You learned that?

A. Yes, I did.

Q. All right. And then you said at some point in time you did personally contact the FBI?

A. That is correct.

[56] Q. And did you talk directly to Special Agent Denise Stevens, who is sitting at counsel table?

A. I did, yes.

Q. Okay. And did you share with her the post that you just spoke about in court today?

A. Yes.

Q. All right. Would that have been on or about October 27th?

A. On or about that date, yes.

Q. Okay. And in between the last post and October 27th you had notified South Whitehall Township Police Department?

A. That is correct.

Q. And that is the police department that covers the actual physical goegraphic [*sic*] area that Dorney Park is located?

A. That is correct also.

Q. Now, after you made the complaint to FBI did you continue to monitor the defendant's Facebook postings/

A. Yes, I --

Q. And can you tell me why you did that?

A. Just for the overall security of the park. I felt it was, you know, part of my job duties to keep an eye on what Mr. Elonis was doing, especially after seeing the last three posts, that I needed to keep an eye and [57] make sure the threats didn't get any more severe, make sure the threats didn't get any more direct. So yes.

Q. All right, good. Do you remember seeing any that were directed at his wife?

A. If I recall correctly, there was one that indicated that he -- that he was -- wanted to kill his wife.

Q. Okay. I'm going to show you Government's Exhibit Number 4 that's been admitted and already published to the jury.

(Pause in proceedings.)

Q. If you can see that okay on your screen, do you remember if you saw this post specifically?

A. That is the post, yes.

Q. Okay. And did you read this one at or about the time that it was posted on the Facebook account?
(Pause in proceedings.)

Q. If I -- let me ask you this. Is it dated November 7th of 2010?

A. It is.

Q. Would that have been during a period of time when you would have been monitoring the defendant's Facebook account?

A. Yes.

Q. And were you daily monitoring his account? Were you checking every day?

[58] A. I was, yes.

Q. All right. And do you remember if you saw this one then on or about November 7th or close there to?

A. Close there to.

Q. All right. And after you read this particular Facebook posting can you tell me what your reaction was?

A. Can I ask you to scroll down a little bit --

Q. Oh, I'm sorry.

A. -- that's okay --

Q. Sure.

A. --so I can see the post again?

(Pause in proceedings.)

Q. Does that help or is it --

A. Yeah.

Q. -- too small still?

A. That's fine, thank you. Okay, I apologize, the question again?

Q. Sure. Can you please tell me after you read this on or about November 7th what your reaction was to seeing this?

A. Yes, I -- obviously it doesn't have any mention of the park in it, so I wasn't concerned for the Park's aspect, but I did feel for his wife at this point. And I was hoping that she was taking action on her end to [59] know that the post was there and do what she could to kind of be aware of it and protect herself.

Q. Okay. And did you see any escalation of the defendant's conduct at this point in time?

A. Yes, I --

Q. You made that observation on your own?

A. Correct, yes.

Q. Okay. Do you remember seeing anything specifically about PFA?

A. Yes, something about it folded up in his pocket.

Q. Okay. I'm going to show you Government's Exhibit Number 5 that's already been admitted and published to the jury. Take a moment to review that.

(Pause in proceedings.)

Q. And do you remember whether or not you saw this particular post?

A. I did see this particular post.

Q. And would you agree with me that it's dated November 15th?

A. Yes.

Q. So this is a few weeks after the defendant's termination from Dorney Park?

A. That is correct.

Q. And if you were monitoring daily, would you have seen this on or about November 16th when it was posted?

[60] A. That is correct also.

Q. All right. And after you actually saw this particular post can you tell me again what your thought process was?

A. Again, obviously it indicates that his wife got a PFA, probably after she saw the first post, and I

just thought to myself that his behavior is just, in my opinion, out of control.

Q. Okay.

A. And I did feel for her.

Q. Okay. So you took this seriously?

A. Very.

Q. And do you remember seeing a post about referencing elementary schools?

A. Yes.

Q. All right. I'm going to show you Government's Exhibit Number 6, which has been offered and published already.

(Pause in proceedings.)

Q. Okay. Would you agree this one is dated November 16th, 2010?

A. I would.

Q. And would you agree with me this one basically says, "Initiating the most heinous school shooting ever imagined and hell hath no fury like a crazy man in a [61] kindergarten class?"

A. That is correct, yes.

Q. And did you read this one at or about November 16th when you were reviewing his Facebook pages?

A. I did.

Q. And, again, can you please tell me what your reaction was when you saw this?

A. Yeah, my reaction when I saw this was this is totally over the line and this man is out of control,

and I think I even notified Agent Stevens again on this date to make sure that she indeed saw this --

Q. Okay.

A. -- and felt that we really needed to take some action at this point.

Q. Okay. And did there come a point in time when you learned, or at least suspected, that Agent Stevens had actually gone out to talk to the defendant?

A. I did, yes.

Q. And how did you learn that?

A. Through Facebook.

Q. Okay.

A. He had posted I'm sure not seconds after she walked away from his door.

Q. Okay. And do you remember the general nature of the post that you saw at that point in time?

A. [62] The post that I saw at that time, I think it was just a general post indicating that she was there and that he didn't need to talk to her.

Q. Okay.

A. And then there was another post later on that I remember seeing also. I think --

Q. That day?

A. -- it was entitled "Litte Agent Lady" or something.

Q. Okay. So later on the same day you saw another more elaborate post referencing Ms. -- Agent Stevens going to the defendant's residence?

A. That is correct.

Q. Okay. I'm going to show you Government's Exhibit Number 7, already admitted and published.

(Pause in proceedings.)

Q. Okay. You see the date up there, November 30th, 2010?

A. Yes.

Q. Okay. Do you remember if you read this -- it sounds like you did from your previous testimony -- on or about that day?

A. I did, yes.

Q. Okay. And after you read this particular post can you tell me what your -- what your thoughts were now?

A. Yeah, I was concerned for Agent Stevens' safety, [63] and I think I even contacted her on her cell phone and alerted her that this was up to make sure that she could take a look at it.

Q. Okay. And now, after seeing this post and taking it in reference to all the other ones I mean did you have a global feeling based upon -- I think we just went through what, six of them, what your thoughts were?

A. Yeah, I did. The totality of the circumstances just indicated to me that, you know, Mr. Elonis was -- at this point in time I don't know what thoughts were going through his mind, but he seemed to be acting irrationally and out of control.

Q. Okay. And did you become even more afraid of what may happen?

A. Yes, yes, I did.

Q. Now, if you saw in some of the previous posts I put up there, there were words in there like "fictitious lyrics," one may have mentioned "rap," one may have had the world "disclaimer," one mention an AL -- ACLU article. Those things were part of these posts. Can you tell me what, if any, thoughts or reaction to that being part of these posts? Did you give that any weight I guess is my question?

A. I definitely noticed it. I definitely thought [64] about it. I really didn't give it much weight. I just looked at it as his way of covering up what he was saying in the event that it would come back at him later on.

Q. Okay.

A. That was going to be his way to try to get himself out of what he had posted.

Q. All right. Did you see that in any way as lessening the seriousness of what you were reading?

A. I definitely did not.

* * *

CROSS-EXAMINATION

BY MR. COOPER:

* * *

[65] Q. Okay. I mean this Halloween Haunt promotion or [66] activity is something that employees can join if they seek to, but there's a selection process that gets involved in that, is that true?

A. If you want to be a costume character, that is correct --

Q. Okay.

A. -- there is a selection process.

Q. All right. And were you aware of any of the circumstances concerning Mr. Elonis and his wanting to be in the Halloween Haunt program? Do you know anything about that?

A. No, sir.

Q. Well, you were a friend on Facebook, right?

A. I was, sir.

Q. And so you were in communication with Mr. Elonis during the time that you were a friend on Facebook? You sent each other messages, is that true?

A. I wouldn't necessarily say that, sir.

Q. Okay. You would say that you looked at what he wrote?

A. When this particular instance was brought to my attention I focused more of my attention on his Facebook.

Q. You never looked at it before?

A. I don't want to -- I'm not going to say that I [67] never looked at it before, but I don't want to say that I communicated. I wasn't a big Facebook user in general.

Q. All right. Were you familiar with Mr. Elonis and his postings on Facebook before the -- the time date of the exhibits that were shown to you by the government?

A. I was not, sir.

Q. You never saw anything that he had posted?

A. Again, I don't want to say I never saw

anything, but I wasn't familiar with his Facebook activities.

Q. All right Now, if you — (Pause in proceedings.)

Q. If you were looking at what he had posted and you saw the first one, which talked about the fire cracker and words to that effect, okay? You saw that posted and did you at any time alert Facebook to this?

A. I did not, sir.

Q. You made a contact with local police?

A. I did.

Q. Okay. And that would have been South Whitehall Police Department?

A. South Whitehall Township Police Department, correct.

Q. Okay. And after you made the contact with South Whitehall Township Police Department did you haves [68] contact with the South Whitehall Police Department? After you told them about what you had seen did you have contact with them again?

A. I did.

Q. Okay. You were told a phone call had been made, is that right?

A. I don't know if I was specifically told a phone call was made. I don't recall. But I was told that they made -- they attempted to make contact with Mr. Elonis.

Q. Okay. And that was the end of the contact you had with the South Whitehall Police Department about this particular posting, is that true?

A. That is not true, sir.

Q. Okay. There were further contacts?

A. Correct, sir.

Q. All right. And was any complaint made against Mr. Elonis, any type of civil complaint, any type of criminal complaint, made with the police, the local police?

A. There was not, sir.

* * *

[BY MR. COOPER:]

[69] Q. So as part of your work in being a supervisor, you went to the communications center and you had a conversation with Mr. Elonis and the conversations was about some problems he was having, is that true?

A. No, sir.

Q. Okay.

[70] A. As part of my work I visited the communications center on a daily basis. When I made my visits to the communications center there were several occasions where Mr. Elonis indicated to me that he was having some family problems and was going through some situations. I also knew that because he had requested his leave of absence, as I had stated in my previous testimony, and when he came back from his leave of absence he came back to my department on July 1st.

Q. Okay.

A. So I was also aware of it throught that.

Q. What did he tell you? What did --

A. More --

Q. -- he tell you?

A. More -- be more specific.

Q. About the domestic problem. What did he say?

A. Oh, that he was going through a divorce, that his wife was trying to take the kids from him, and just --just those type of things. You could see he was very upset. There were several occasions where my supervisors reported to me that they had looked over at Mr. Elonis when he was at his work position and found his head down on the desk and he was just crying hysterically. There were several occasions where the superviseor [*sic*] had to send him home from work before they [71] didn't feel that he could do his job and function in his job capacity because he was so upset.

Q. Okay. So if I were to characterize what you saw of him or what other people reported to you of what they saw of him he was in a -- he was highly emotional. Is that a fair way to express it?

A. I would say that.

Q. It -- would it be a fair way to say that he was duress?

A. Yeah, I would say that.

Q. Okay. And it's fair to say that because you -- obviously you have experience working with people, is that right, and you know when they're under stress and you know how they react to stress? I mean you see that in your -- in your everyday experience in the job that you have, is that right?

A. Correct, sir.

Q. And if I were to say that this was pretty good in terms of duress and stress, would that be a fair statement?

A. Correct, sir. Yes.

Q. Pretty good?

A. Yes.

Q. Okay. Now, does the Dorney Park employer offer --do they have as part of any type of counseling as part [72] of employee benefits or things to offer employees? Is there any reference that is -- can be made to that?

A. To my knowledge, yes. But, again, that's something that would be through human resources. I'm not familiar with the exact details, but I'm thinking if an employee went to human resources and indicated that they needed some help, that human resources would do their best to provide them with the help that they needed.

Q. Okay. Did anyone, if you know, yourself or anybody else, report anything to human resources about what you observed of Mr. Elonis and his emotional appearance?

A. It was reported to human resources by my department. It was also reported to human resources by the operations department when he was an operations supervisor.

Q. Okay. So am I -- it would be fair to say that prior to the time Mr. Elonis was terminated from Dorney Park that there's at least observance and reporting that he's having some emotional difficulty? Is that is that a fair way of saying it?

A. From the time the he was or previous to him

being terminated?

Q. Previous to being terminated --

A. Okay.

[73] Q. Okay? And when I say previous to being terminated, within a very short time frame of prior to being terminated, would it be fair to say that it was observed by you and it was reported either by you or by others that Mr. Eloniw [*sic*] was having emotional difficulty? Is that -- is that a fair statement?

A. Yes, it is.

Q. All right. Now, you said that you were a user of Facebook but you were not a frequent user of Facebook. You had a user account number but you weren't using it a lot. Am I correct to say that?

A. Correct.

Q. All right. And you knew that Mr. Elonis used it a lot, is that true?

A. Prior to these posts, no.

Q. Never -- never heard of that by anybody?

A. No.

Q. Okay. Not -- none of the employees? Nobody ever said to you he's on Facebook a lot?

A. No.

Q. Okay. You know that if you use Facebook, there are Comments that go back and forth from what somebody posts on the Facebook wall if they're on the friends list or if anyone wants to posts comments, is that true?

[74] A. Sure, yes.

Q. Okay. Were you looking at those comments while you were looking at those postings to see how anybody saw them or anything like that?

A. I was -- I was not. I was not looking at the particular comments. I was trying to look quickly at the names of who was commenting to see if there were any other employees that were commenting --

Q. Okay.

A. -- or kind of chiming in but wasn't looking specifically at the comments that the other people were making.

Q. Okay. Were there other employees chiming in?

A. I think we may have counted one or two during the whole episode.

Q. Okay. This picture that the government showed you, which was I think Government Exhibit 11, which was the two -- one person then asked -- okay, and the other person with the knife --

A. Yes.

Q. -- that was -- that photo was part of a promotion of the Halloween Haunt by Dorney Park. You're aware of that, is that right?

A. I was not aware that it was a promotional photograph.

* * *

[BY MR. COOPER:]

[78] Q. And as far as employee entrance is concerned, you have patrol there, uniformed patrol?

A. Correct, we man those gates, that is correct.

Q. And it's uniformed patrol, I mean somebody

who can be identified as being in patrol by anybody who is walking up there, is that right?

A. Absolutely, sir.

[79] Q. And there is employee IDs that need to be scanned as well, is that correct?

A. Correct.

Q. All right. And these employee IDs need to be scanned whether they're in costume or out of costume, is that correct?

A. That is correct.

* * *

[79] Q. So anyone who is in costume would need an employee ID and it would have to be scanned by patrol for them to gain admission to the park?

A. Correct.

Q. Is that true?

[80] A. Yes, it is.

Q. And if Mr. Elonis was terminated, his employee ID was confiscated, true?

A. True.

Q. And so he would not have an employee ID to be scanned by employee park personnel patrol at the employee gate, is that right?

A. Not necessarily. If he would have gotten a duplicate ID from human resources on another occasion, if one day he would have forgot his ID and needed to get a duplicated ID from human resources and now he has two and turned in one when he's terminated. The only reason I bring that up is because we've had it happen before.

Q. All right. Do you have a record of that that he asked for and got another ID?

A. That would be --

Q. Do you have that?

A. It would be a human resources thing, but I don't think that they keep record if they issue a second ID. And there's nowhere printed on the ID that it's a dup or a second or anything like that.

Q. Okay. So if you haven't -- I'm not following you. If you have employee IDs that need to be scanned --

A. Uh huh.

[81] Q. -- isn't there a specific scanning feature to that specific ID card?

A. There is a bar code on it that scane [*sic*]

Q. Okay. So if --

A. But --

Q. If you have that card and you have that bar code and he's terminated, right, you can terminate the card whether he turns it in or not, right?

A. That is -- that is correct.

Q. You can terminate the bar code --

A. Sure.

Q. -- right?

A. Sure, sure.

Q. So if somebody came in with the bar code as a duplicate card and tried to get in and put it under the detector, it's not going to have it because that code has been cancelled?

A. If it was cancelled, correct.

* * *

[BY MR. COOPER:]

[83] Q. All right. And that was after you began to observe him -- that was before you began to observe him. And then after that time that you observed him and it was insecurity you saw him having these emotional problems with regard to the domestic situation, is that correct?

A. That is correct.

Q. Okay. Now, it would fair to say, if you know, he loved that job that he had at the park?

MS. STEPHAN: I'm going to object, Your

Honor.

MR. COOPER: If he knows.

THE COURT: I'll overrule the objection.

THE WITNESS: It would be fair to say that I would assume. I mean he was at the park for nine seasons, so why would one come back for nine seasons if they didn't love their job?

[84] Q. Okay. I mean he basically expressed that in the posting too, isn't that true? Do you remember that?

A. I don't remember that, sir.

Q. Okay. Well, if I showed it to you it would refresh your recollection?

A. It could.

Q. Okay.

(Pause in proceedings.)

Q. This has been published and admitted. And if you would look at -- I'm sorry, I'm not putting it on right. Do you see it in front of you, sir?

A. I do see the post in front of me, yes.

Q. Okay. Now, there's a red circle and then underneath there's a paragraph that says, "I was once park supervisor. I was schooled on the importance of progressive documented disciplinary action. There is none in my case," is that correct?

A. That is what it says.

Q. Okay. So he's not happy -- he's not happy with being terminated? We could gather that, right?

A. We could.

Q. Okay. And he's an emotional guy?

A. He seems to be.

Q. And he describes in the end, "I'm still thankful to [85] finally be free. I gave too much of my time and effort and got little or no respect. It's a shame because I love the park and I love (inaudible)." That's what he wrote?

A. Okay.

Q. Is that right?

A. I can't see that portion of the post, but --

Q. Okay, I'm sorry.

A. -- I'll take your word for it.

Q. I didn't know that. Let me look -- I'll just slide this a little higher below that red circle. Can you see the paragraph that's written there? Do you see that?

A. Yes, I do.

Q. All right. This is a guy who's expressing himself, is that right?

A. I would assume that that's what that is, yes.

* * *

[REDIRECT EXAMINATION]

[BY MS. STEPHAN:]

[87] Q. All right. Now, you were asked some questions about the picture in costume of the defendant and Amber Morrissey. I'd like to ask you in looking at that picture again, was your concern about seeing this on the defendant's Facebook account the image itself or the comment that he put in reference to the picture?

A. Yeah, I think what caught my eye was the comment underneath the picture, yeah.

Q. Okay. That obviously tied to the picture itself?

A. Yes, that is correct.

* * *

[RECROSS EXAMINATION]

[BY MR. COOPER:]

[88] Q. Okay. When you saw the posting did you delete it?

A. I did not. I didn't know that you could at that my Facebook knowledge is very limited.

* * *

APPENDIX J

[Transcript of Jury Trial – Day 2 – October 19, 2011]

* * *

[89] COURTROOM DEPUTY: Please state your full name for the record and spell your last name.

[90] THE WITNESS: Tara Louise Elonis, E-L-O-N-I-S.

* * *

DIRECT EXAMINATION

[90] Q. Good morning, Ms. Elonis.

A. Good morning.

Q. Is that the name you go by still?

A. Yeah, for now.

Q. For now, okay. Do you know the defendant in this case, Anthony Elonis?

A. Yes, I do.

Q. And how do you know him?

A. He is my soon to be ex-husband.

Q. Why don't you pull that in a little bit if you can?

A. Sorry.

Q. There you go. Does it not stay? Okay. I think it's moving back. And I know it seems to be moving on its own. I'm sorry, you said you know him. And how?

[91] A. He is my ex-husband, or soon to be ex-husband.

Q. Is there divorce proceedings at least filed at this point?

A. Yes, there are.

Q. All right. So technically you're still married?

A. Yes.

Q. Do you have any children with the defendant?

A. Yes, I do. I --

Q. And how many?

A. Two.

Q. How -- what are their ages?

A. Seven and eight.

Q. So obviously at some point in time you decided to terminate your marraige and separate from the defendant in this case?

A. That is correct.

Q. Do you know approximately when you made that decision?

A. I moved out of our apartment in May of 2010.

Q. Okay. And where did you go after you moved out?

A. I moved in with my father.

Q. And where does your father live, what town?

A. Merkstown, Pennsylvania.

Q. And had the defendant been to that residence on prior occasions before you moved out?

[92] A. Yes.

Q. So he knew it? Had he been inside the residence as well?

A. Yes.

Q. All right. Did you take your two children with you when you moved out?

A. [92] Yes, I did.

Q. So they resided with you in your father's home?

A. That is correct.

Q. In October of 2010 did you file for what's known as a Protection from Abuse Order?

A. Yes, I did.

Q. And if you can, to the best of your ability describe in your own words what a Protection of Abuse -- for Abuse Order is? What were you seeking?

A. It is an order that protects you from a person that you feel may harm you or has harmed you, and it just requies [*sic*] them that they can't contact you or come anywhere near you.

Q. Okay. And did you actually have a hearing after you filed that Protection from Abuse -- I guess it's called a petition.

A. Yes.

Q So you were asking the Court to issue that kind of order?

[93] A. Yes.

Q. Is it generally referred to just to shorten it a a [*sic*] PFA Order?

A. Correct.

Q. Okay. I'll refer to that from this point forward --

A. Okay.

Q. -- just to be a little more brief. So you did, in fact, file for the PFA Order and you had a hearing?

A. Yes.

Q. Do you know the date that that hearing occurred?

A. I believe it was November 4th of 2010.

Q. And was the defendant present at that hearing?

A. Yes, he was.

Q. And obviously you were as well?

A. Correct.

Q. Did you need to testify at that hearing?

A. Yes, I did.

Q. And for about how long did you testify?

A. I don't know exactly how long I testified. I do know that the hearing went on for probably about three hours.

Q. All right. And during that time did you present Facebook postings to the cour [*sic*] that were posted by the defendant, in this case your husband?

[94] A. Yes, I did.

Q. Was he present in court when you did that?

A. Yes.

Q. At the end of the hearing were you, in fact, granted a Protection from Abuse Order?

A. Yes, I was granted the maximum order and suspended custody.

Q. Okay. So you got full custody of the kids at that point in time and you got the maximum period of time that was allowed?

A. Correct.

Q. And what time period was that?

A. Three years.

Q. Would it be fair to say that the information that you testified to during the hearing itself consisted mostly of -- I shouldn't say mostly consisted in part of Facebook postings?

A. Yes.

Q. And was that in Berks County, Pennsylvania?

A. Yes, it was.

Q. And at the time that you had this PFA hearing and the order was granted was the defendant living in Bethlehem, Pennsylvania at that time?

A. I believe so, yes.

Q. And that's where his parents resided?

A. [95] Yes, correct.

Q. After you got the PFA Order protecting yourself -- and did it protect your children as well?

A. Yes.

Q. All right -- protecting you and your children, did you have occasion to still see posts that were being made on Anthony Elonis' Facebook page?

A. Yes, his profile was completely public. If anything was posted, anybody could log in and see it, and he had several of my friends and family members added.

Q. Okay. So several of your friends and family members were still technically on his list of friends? Is that what you're saying?

A. That's correct.

Q. All right. This was at the time of the PFA Order?

A. Correct.

Q. You yourself were not considered --

A. No, I was not.

Q. All right. But you did have access to him directly because they were public?

A. Yes.

Q. And is that because you had your own Facebook account?

A. I do have my own Facebook account, but I believe [96] all you had to do was go to the URL of Facebook, like anybody could look at it.

Q. Okay. And then you could see the posts that were there?

A. Correct.

Q. All right. Did you, in fact, after the PFA hearing go to his account and look at the posts that were there?

A. Yes.

Q. Can you tell me why you did that?

A. It was brought to my attention that he was making more posts about me and about harming me so I did look at them just to see what they said.

Q. Okay. Were you still concerned at this point in

time for what they said what may happen?

A. Yes, I was.

Q. Do you remember seeing a post on or about November 7th, 2010?

A. Yes.

Q. Would it be fair to say that was approximately three days after your PFA hearing?

A. That is correct.

Q. I'm going to show you Government's Exhibit Number 4, which has previously been admitted and published. I'm just going to zoom in a little bit for you in parts [97] because it's kind of small print. It's hard to see the whole thing at once. Okay. Do you see at least the top part of it?

A. Yes, I do.

Q. Okay.

A. Yes, I do, sorry.

Q. And do you remember reading what's in this particular post?

A. Yes.

Q. And I'm going to scroll down for you. And do you remember seeing what's on the bottom part of this post?

A. Yes, I did.

Q. And do you see that there's a date there listing November 7th, 2010?

A. Yes, I see that.

Q. Do you remember at what point after this would have been posted it was brought to your

attention and you yourself went and looked at it?

A. I think it was probably the same day but definitely within twenty-four hours of it being posted.

Q. Okay. Now, after reading this particular post can you tell me how it is you felt? What was your reaction?

A. I felt like I was being stalked. I felt extremely afraid for mine and my childrens' and my families' [98] lives.

Q. So it sounds like you took it very seriously?

A. Yes.

Q. All right. Let me point out to you the -- I'm going to zoom in on this. There's kind of a computer-generated diagram of sorts. Okay. And I think above it it [*sic*] says, "Yet even more illegal to show an illustrated diagram." Or actually, you know what I'm going to do, I'm going to ask you just to read to put this in context starting from there if you could. From there down to the drawing, if you could read that out loud to put that into context.

A. You want me just to read?

Q. To read it out loud, please, yes.

A. Okay. "I also found out that's it's extremely illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the corn field behind it because of easy access to a getaway road. And you'd have to clear -- you'd have a clear line of sight through the sun room, insanely illegal, ridiculously, recklessly, insanely illegal, yet even more illegal to show an illustrated diagram."

Q. And we just referenced that diagram, but do you see that there as well?

[99]A. Yes.

Q. And in looking at this diagram, does it -- is it accurate for anything in your life?

A. Yes, this is a diagram pretty much of how my father's house is setup.

Q. And can you please explain that in more detail as it relates to the diagram?

A. Okay. My father's house is a small rancher with a sun room in the back. There are corn fields surrounding the house. The corn field straight through the backyard there's a road behind that not very many cars go on.

Q. Okay. So the way this diagram is actually put into this post, this would represent your I guess father's house and the sun room, would that be accurate?

A. That's correct.

Q. And then you said right behind the house is the corn fields?

A. That is correct.

Q. And then this road runs parallel to the corn field, as we can see in this diagram?

A. That is correct.

Q. And that's where you're living at the time that this post was made?

A. That's correct.

[100] Q. And that's where you children were living as well?

A. Yes.

Q. And you said you accessed this by getting onto his Facebook page, and you had public access to it, meaning you didn't have to be a friend of his to see it?

A. That is correct.

Q. I'm going to point your attention as well up towards the top of this post where it says, "Indirect Criminal Contempt." Do you know if that's any terminology related to your PFA proceedings?

A. I have no idea, honestly.

Q. You don't know what that means personally? (Pause in proceedings.)

Q. Did you continue to monitor the defendant's Facebook account after you read this particular post?

A. Yes, I did.

Q. And did you see one on or about November 15th, 2010 that also pertained to you getting a PFA order?

A. Yes, I did.

Q. I'm going to show you what's been already admitted and published as Government's Exhibit Number 5.

(Pause in proceedings.)

Q. Okay. Can you see that whole thing on your screen?

A. Yes, I can.

Q. Okay. Do you remember seeing this particular [101] threat?

A. Yes, I do.

Q. And why don't -- because it's relatively short, why don't you read it out loud so we all have contacts again?

A. "Fold up your PFA and put it in your pocket. Is it thick enough to stop a bullet? Try to enforce an order that is improperly granted in the first place. Me thinks the judge needs an education on true threat jurisprudence," -- sorry I can't pronounce that -- "and prison time will add zeros to my settlement which you won't see a lick, because you suck dog -- in front of children and worse comes to worse I've got enough explosives to take care of the state police and the sheriff's department."

Q. Okay. Now, after you read -- well, let me ask you this first. Do you remember if you read this on or close to the date it was posted, November 15th, 2010?

A. Close to, I'm not sure if it was the same day.

Q. All right. Do you know whether or not you saw it directly or someone brought it to your attention?

A. I believe someone brought it to my attention.

Q. Okay. And then you went on the Facebook page yourself and saw it personally?

A. Correct.

[102] Q. All right. And, again, can you please explain to the jury what you reaction was, how you felt when you read this particular post?

A. It made me extremely afraid for my life. I mean I got the protection order to protect myself and my children and he was still making the threats for everyone to see and that's all.

Q. Okay. And did you continue again to keep looking even after that post, to keep monitoring the Facebook account?

A. Yes, I did.

[102] Q. All right. And, again, why would you continue to monitor it at this point in time? Can you explain why?

A. Mostly just to see what he was saying as far as what he was saying about me. I guess just keeping --

Q. In any way were you doing --

A. -- a look out for myself.

Q. Okay. To look out for yourself. So you were trying to protect yourself at that point in time?

A. Correct.

Q. Also your family I would assume?

A. Correct.

Q. All right. And did you come a point in time when you saw one that wasn't necessarily directed directly at you but caused you some concern as well?

[103] A. Yes.

Q. Did that have to do with a kindergarten class?

A. Yes.

Q. All right. I'm going to show you what is marked as Government's Exhibit Number 6, already admitted and published.

(Pause in proceedings.)

Q. Okay. This bears the date November 16th, 2010, is that correct?

A. Yes.

Q. Do you remember if you saw this post on or close to that date -- excuse me -- that it was posted?

A. Close to I'm sure.

Q. All right. And this would have been the date after the post we just talked about where he said, "Fold up the PFA and put it in your pocket."

A. Okay.

Q. "Is it thick enough to stop a bullet?"

A. Yes.

Q. That's right, it's the day after.

A. Okay.

Q. Okay. And when you read this particular post can you tell me what your thought process was at this point? What was your reaction?

A. I was just extremely scared. I don't know.

[104] Q. Okay. Did you give any thought as to what, if anything, you should do based upon these two new posts directed at you and this post here?

A. At this point I think he had posted that he knew the FBI was investigating him from his termination at Dorney Park. I figured that in time someone would take care of it. No one really listened to me from my -- what was going on with me so --

Q. You had made several complaints about the post that you read?

A. That's correct.

Q. All right. And you didn't think anybody had taken you seriously in the early stages?

A. No, not in the early stages.

Q. All right. Somebody obviously eventually did because you got your PFA Order?

A. That's correct.

Q. All right. And you said you knew at that point in time -- it was your understanding at least that law enforcement was involved?

A. Yes.

Q. Okay. Did the defendant ever during your marraige [*sic*] express an interest in rap music?

A. Very rarely did he listen to rap music. I'd say occasionally but not enough that I would think it [105] would aspire him to be a rapper.

Q. Okay. Did he ever, as far as you were aware, write rap lyrics or anything of that nature?

A. I had never seen him write.

Q. Okay. Did -- did he see on his Facebook account as it relates to these postings that there were some terminology or reference to like, for instance, it's illegal for me to say but I'm sort of saying it anyway, that kind of phraseology? Did that give you any pause or make it any less serious to you when you read those kinds of statements?

A. Not at all.

Q. Did you see those kinds of statements posted throughout his Facebook account?

A. Yes.

Q. And, again, did you give them any weight when you saw them in other places in the Facebook account?

A. What was the question again?

Q. Did you give those statements basically when he might be saying he's got some right to be able to say these things or that it's fictitious lyrics or that it's rap music, did you attribute any significance to him saying that?

A. No, I never considered any of it false just because it was in lyric form.

[106] Q. Okay. And did -- did you think there was any kind of reason for why he would have been posting the things the way he was posting, saying they were fictitious or rap lyrics?

A. I know he did make some statements on his Facebook that he wanted to be arrested, that he wanted to go to jail, he wanted to serve time because he felt that he was going to be found not guilty and then he's going to sue everyone and get rich off of it.

Q. Is that one of the reasons you took his threats even more seriously?

A. Yes.

Q. Okay.

* * *

[CROSS-EXAMINATION]

[BY MR. COOPER:]

[107] Q. All right. And you had children with him and you told us about that. During that time when you were first married, correct me if I'm wrong, is it fair or unfair to say that you and Mr. Elonis had viewed things together that would describe sex, violence, things of that nature? Is that an unfair statement or is there a fair statement?

A. What do you mean by that question?

Q. Okay. Did you view any like videos of rap artists, for example, singing in terms of violence? Did you ever look at that?

A. Not together that I remember, no.

Q. Not together?

A. No.

Q. So it would have been separately that you had viewed that? Am I wrong to say that? [108] I'm not quite sure I understand the question. Are you just asking me if I listen to rap music in general or --

Q. Well, you -- are you -- did you listen to rap? Let's start with that. Did you listen to rap music in general when you were --

A. I like rap music, some, yes.

Q. Okay. And at this early time I'm talking about now when you were first married, is that true?

A. I listened to some, yes.

Q. Okay. And did you -- you're saying you didn't listen to it together with Mr. Elonis? That didn't happen?

A. We did not have the same music tastes at all, so no, I don't think we listened to music together willingly very often, no.

Q. Okay. Do you remember what his music taste was?

A. lot of pop and older stuff.

Q. Okay. But nothing connected to rap?

A. Maybe occasionally, but he didn't listen like I said, there's not certain artists or anything like that that pop out at me.

Q. Okay.

A. Maybe the occasional song or something.

Q. I mean you are familiar with rap artists? We can [109] say that?

A. Some, yes.

Q. Like free Weezy, also known as Little Wayne, you know that?

A. Sure.

Q. Okay. You know Eminem?

A. Sure, yes.

Q. Okay. And your testimony as that you never heard Mr. Elonis listen to these types of artists together with you as you were first married --

A. No, he --

Q. -- and living together, is that --

A. He actually made fun of me for listening to it.

Q. Okay. That's your testimony, that he made fun of you for doing that?

A. That is correct.

Q. Okay. So do you have any idea why he would post anything containing lyrics that related to rap?

MS. STEPHAN: I object, Your Honor.

THE COURT: What's the objection?

MS. STEPHAN: He's asking if she knows why he posted the rap lyrics. I don't think she can answer that question.

THE COURT: I'll allow you to rephrase.

MR. COOPER: Okay.

[110] BY MR. COOPER:

Q. You saw rap lyrics that he had posted?

A. That is correct.

Q. And you saw them before you moved out?

A. No.

Q. Never?

A. I didn't see any until after I moved out.

Q. Okay. So after you moved out in May of 2010 is when you started to see the rap lyrics?

A. That's correct.

Q. And that was on the Facebook?

A. That's correct.

Q. And that was on the Facebook that you would look up, is that right?

A. That's correct.

Q. And you looked it up to see what he was doing, is that right?

A. No, he would actually comment my little sister and write status updates about me and say did you carry on that message to my sister so of course I would go look at it and they would be threatening.

Q. Okay. So the reason you would look is because your sister told you about it?

A. Correct.

Q. And is that Morgan?

[111] A. Yes.

Q. And so he would post to Morgan and Morgan would tell you what Mr. Elonis posted?

A. That is correct.

Q. And then you would look it up?

A. That is correct.

Q. And did she tell --

A. It was all public.

Q. I'm sorry.

A. It was all public.

Q. I understand. Did she tell you what it was that he had posted before you looked it up?

A. Yes.

Q. Okay. And when you started to look it up was it rap lyrics?

A. Some of them.

Q. Okay.

A. But not all of them were in lyric form.

Q. All right. Did -- in one of the exhibits that the government showed you where he wrote about it's illegal and that whole rhyme, there's a -- a reference to "Whitest Kid [*sic*] You Know" video.

A. That is correct.

Q. Okay. Do you know what that is?

A. Yes, I have seen it before.

[112] Q. Okay. You had seen it before, is that right?

A. That's correct.

Q. Okay. And you had seen it before because you had seen it before with Mr. Elonis on Netflix, is that true?

A. Possibly that's where I saw it, maybe Youtube, but I had seen it before, yes.

Q. Okay. Had you seen it with him is another question that I have?

A. Possibly, yes.

Q. Okay. And it would be fair to say that that video, "Whitest Kid You Know," is exactly the words, with the exception of a couple, that are in that in that posting, is that right?

A. That is correct, including the diagram of my house.

Q. Okay. So all of that is from a video sketch that you had seen in the past. Am I correct to say that?

A. That is correct.

* * *

[BY MR. COOPER:]

[126] Q. All right. Now, after you moved out and up until now, other than Facebook, other than the Facebook postings, has Mr. Elonis written you a letter?

A. Do you mean before the PFA or since we've been separated in May?

Q. Well, let's talk about before the PFA. Did he write you any letters?

A. He did not write you a letter, no.

Q. And after the PFA?

A. No, I have not heard from him other than Facebook after the PFA.

Q. Okay. So if I understand your testimony that you're giving us today, you're not familiar with Mr.

Elonis listening to rap music or writing about rap music and posting anything about rap music?

MS. STEPHAN: Objection, Your Honor, asked and answered. We've been through this already.

THE COURT: It has been asked and answered. Are you summarizing?

MR. COOPER: I am.

THE COURT: I'll overrule the objection.

BY MR. COOPER:

Q. Is that true?

A. Yes.

* * *

[REDIRECT EXAMINATION]

[129] BY MS. STEPHAN:

Q. Okay. I'm going to show you what I'll mark as --I'm sorry -- Government's Exhibit Number 12, not for the jury. Can you read to yourself what I have on the screen before you?

A. Yes, I've read it many times.

Q. Okay. So you're familiar with this. Do you know if this was a post that was -- well, it is a post from [130] Facebook, is that correct?

A. That's correct.

Q. And was it posted by the defendant in this case, Anthony Elonis?

A. Yes.

Q. Do you know about what time frame this post was made?

A. October of 2010. It would have been before the

Protection Order. This is actually one of the postings that I brought along with me to get the protection order.

Q. Okay. So these -- this is one of the things that was going on in your life at that point in time in your relationship with the defendant in this case?

A. That's correct.

* * *

[132] BY MS. STEPHAN:

Q. Okay. Tara, if you could please read for me what you see the top post where it says Anthony Elonis. Can you read that for us?

A. Yes. "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off into a creek, and make it look like a rape and murder."

Q. When you read this post did you read it as [133] applicable to you?

A. Yes.

Q. And is there any reason why?

A. Toad Creek is a little creek right by the apartment where we were living when we were last together and in the town where we met.

Q. Okay. Thank you. I'm going to show you Government's Exhibit Number 13, not for the jury at this point. Are you familiar with what's on the screen before you?

A. Yes, I am.

Q. And can you please tell the jury what that is?

A. This is a status update of my younger sister's where we were talking about Halloween costume shopping, and Anthony commented on it.

Q. And is his comment depicted on the screen itself?

A. Yes.

Q. And your sister's name is what?

A. Morgan Kennedy.

Q. So it's her Facebook account. You saw this personally on her Facebook account?

A. That is correct. I commented on it as well.

Q. And then it contains Anthony Elonis' name and basically associated with his Facebook account?

A. Correct.

[134] Q. Thank you.

MS. STEPHAN: I'd like to move for the admission of Government's Exhibit 13, Your Honor.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: It will be admitted.

(Government's Exhibit 13, Facebook status update, is admitted into evidence at this time.)

MS. STEPHAN: Thank you.

BY MS. STEPHAN:

Q. I'm going to direct your attention then -- well, actually, let me take that back. All right. So Morgan Kennedy is your sister?

A. That's correct.

Q. All right. In the first line of this she's saying, "Halloween costume shopping for my niece and nephew should be interesting." So when she's talking about niece or nephew she's talking about your children?

A. That is correct.

Q. All right. Then at some point you respond. You say, "Talk about a headache, at least Riley. Didn't know he could be the difficult one." What do you mean by that?

A. Just that they were being difficult in the store that day like children are sometimes.

[135] Q. Were they having trouble picking out their costumes or something?

A. That and just, you know, having temper tantrums over little things.

Q. All right. Okay. Well, then Anthony Elonis appears to respond. What does he say in the post?

A. "Fuck you, mommy. Lol."

Q. And that was right after you posted yours obviously? It comes right after?

A. That is correct.

Q. And then why don't you continue to read the exchange from that point down if you can for us?

A. Okay. I responded by saying, "Oh, boy, starting with the Facebook comments again -- or insults again." He responds with, "You have to excuse me. I'm on a stimulant, a depressant, and a psychoactive. You ain't seen nothing yet. Did Morgan pass on my status update? Lol." He also then said, "Tell Riley he should dress up as a matricide for

Halloween. I don't know what his costume would entail though. Maybe your head on a stick." And then I followed it just with the definition of a matricide, which is the act of killing one's own mother, or a person who kills his own mother."

Q. All right. And you looked up that definition [136] yourself?

A. Correct.

Q. And do you know about when -- well, obviously this was getting closer to Halloween at that point in time, correct?

A. Correct.

Q. Okay. I'm going to show you Government's Exhibit Number 14, not for the jury. And I'm going to bring your attention to at least the first post. Well, this is -- would this be accurate that this is also another Facebook posting we're showing you?

A. That is correct.

Q. And is this a Facebook -- excuse me. Is this a Facebook posting from Anthony Elonis', your soon to be ex-husband's, account?

A. Correct.

Q. And did you personally see this posting?

A. Yes.

MS. STEPHAN: I'd like to move for the admission of Government's Exhibit Number 14, Your Honor.

THE COURT: Any objection.

MR. COOPER: No, Your Honor.

THE COURT: 14 will be admitted.

(Government's Exhibit 14, Facebook post, is [137]

admitted into evidence at this time.)

BY MS. STEPHAN:

Q. Why don't you just read it this time? Start with just the first part -- the first posting there if you may.

A. Okay. "If there's any truth to these lyrics, don't they cut like a knife. Fuck you, bitch. All I wanted was a wife and a family to call my own. Now I'm living in the zone saying fuck this world like it owes me money, and I'ma [*sic*] make it pay."

Q. And do you know about when you saw this particular posting?

A. It would have been in October of 2010. I don't know the exact date, but I know all of these are from that month.

Q. Okay. And I'm going to show you Government's Exhibit Number 15, not for the jury. Are you familiar with -- well, this is a Facebook post again, correct?

A. Correct.

Q. Is this coming from Anthony Elonis' Facebook account?

A. Correct.

Q. And did you personally see these posts as well?

A. Yes.

Q. And do you know approximately when this would have [138] been made?

A. October of 2010 sometime.

MS. STEPHAN: I'd like to move for the admission of Government's Exhibit Number 15, Your Honor.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: It will be admitted.

(Government's Exhibit 15, Facebook post, is admitted into evidence at this time.)

BY MS. STEPHAN:

Q. Okay. Could you please read this for us.

A. Yes. "There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you."

MS. STEPHAN: I have nothing else, Your Honor.

* * *

[139] [BY MR. COOPER:]

Q. Government 13. Government 13 is a posting that you talked about and it's admitted into evidence. Now, if I understand this, it says, "Tara Louise and then Anthony Elonis and then Tara Louise." Is Tara Louise you?

A. Yes, that's my middle name.

Q. Okay. Does that mean that Tara Louise is somebody who is posting? Is that you posting?

A. Yes, I was responding to the status update.

Q. Okay. And are you doing that on your sister's

Facebook or your own Facebook?

A. I was commenting to my sister's status update so it would have been me commenting on her Facebook.

Q. Okay. And the reason that you were able to see her Facebook is she sent it to you or you had -- you had her account number? How did you get to see the posting?

A. She is my friend on Facebook so it shows up right [140] in my newsfeed.

Q. Okay. So whatever is posted to Morgan would show up on your newsfeed because she's your friend?

A. Correct.

Q. And then you can respond back to that?

A. Correct.

Q. Okay. And you know by responding back to that that the reponses [*sic*] are going to go back to Mr. Elonis, is that true?

A. Well, yeah. Yes.

Q. Okay. So the third posting says, "Tara Louise: Oh, boy, starting with the Facebook insults again?" A. Yes.

Q. Okay. "Insults" is the word that you used?

A. Yes.

Q. Not "threats," "insults," is that right?

A. Yes.

Q. And Mr. Elonis would also indicate on these postings disclaimers?

A. He did have a disclaimer up, however,

following the disclaimer he had "Lol" written. So to me that meant the disclaimer was a joke to him.

Q. All right. Do you see the -- on this exhibit that's before you where it says, "Anthony Elonis: Tell Riley he should dress up...?" It's the last one that [141] you see there, "...head on a stick," and then there's s symbol next to it. Do you see the symbol?

A. Yes.

Q. What's -- do you know what the symbol means?

A. It's like a smiley face, tongue sticking out.

Q. Joke?

A. I guess possibly, or like in your face, neener, neener, kind of thing.

* * *

APPENDIX K

[Transcript of Jury Trial – Day 2 – October 19, 2011]

* * *

[144] COURTROOM DEPUTY: Please state your full name and spell your last name for the record.

THE WITNESS: Amber Nicole Morrissey, M-O-R-R-I-S-S-E-Y.

* * *

[BY MS. STEPHAN:]

[157] Q. Okay. On or about October 19th did you see a picture of yourself in costume on Facebook on the defendant's Facebook page?

A. I did.

Q. And how did you come to see that particular photo?

A. One of my friends showed me who were still friends with him on Facebook.

Q. Okay. So your friend saw it on his Facebook page because she was still a page on his Facebook page, is that what you're --

A. That person was, yeah.

Q. That person was. Okay. And she told you about it?

A. Yes.

Q. And then did she show it to you did you say?

A. Yeah.

Q. I'm going to show you what's marked Government's Exhibit Number 11, which has

already been admitted and published.

(Pause in proceedings.)

Q. Okay. Do you have that before you?

A. Yes.

Q. And can you please explain if you are depicted in this picture?

A. Yes.

[158] Q. And the circumstances if you can of just talking about the picture independently of the Facebook posting, tell us about when that picture was taken and under what circumstances.

A. That was taken the season before this one so it would have been I believe in 2009.

Q. Okay.

A. And it was my first year working Haunt. I worked it two years. And we had a couple of my friends and I had taken pictures just similar to this just because it's Halloween and we were just joking around. It was never meant seriously.

Q. Okay. And this is a picture -- you were dressed up in costume as part of your employment that day?

A. Correct.

Q. And so was the defendant, who is depicted next to you in the image, is that correct?

A. Correct.

Q. All right. And so this was something that was done a year before the date of the posting, which is October 19th, 2010, is that correct?

A. Yes.

Q. All right. And when you saw this on his Facebook page what were your thoughts? How did you react?

A. When I saw the "I wish" I felt more threatened. I [159] was already scared -- I was already scared to go to work almost because of seeing him there, and I know it was the reason that well, I'll say I was. I was the reason that he was demoted, because I kept persisting that, you know, he was threaten -- threatening me, and this just brought full circle that, you know, he wishes he could kill me so --

Q. Okay. So then let me just go back to a few things you just said. It's your understanding that he was demoted because you made the complaints that you made to human resources?

A. Correct, among others.

Q. Among others, okay. But those are just -- those are just some of the complaints that were made, correct? All right. So you believe because of his supervisory contact with other employees as well as what you described in the office at night that that was part of the reason why he was demoted to a different position?

A. Correct.

* * *

[BY MS. STEPHAN:]

[160] Q. Okay. Now, when you saw this particular post and you said what concerned you as that comment right there, "I wish," attached to the photo --

A. Correct.

Q. -- what did you do?

A. I went to -- I want to my supervisors and I told them that I really did feel threatened even more and I didn't feel safe at work. I went to the security and I asked them to do something about it. And I went to human resources and asked them to do something about it. And nothing was getting done so I went to the general manager and I asked him to do something about it and that's when he told me that he was getting fired at that time.

* * *

[162] MS. STEPHAN: I'm going to show the witness Government's Exhibit Number 1, which is previously admitted and published. It's a little small.

BY MS. STEPHAN:

Q. If you can just review that and let me know if it's something you remember seeing and reading.

A. I do remember reading this.

Q. You remember reading the whole thing?

A. I do.

Q. And do you see the date up top? This one's dated October 19th, 2010?

A. Yes.

Q. Do you recall, seeing that date now, whether or not [163] you would have saw it close to or at or near the time of that date?

A. I believe it was after that date.

Q. Okay. A day or two after or a longer period of time after?

A. I can't say exactly.

Q. You don't know. Okay. When you saw this particular message on his Facebook account what were your reactions to it?

A. I was very nervous. I knew by him saying Dorney Park it also referred to me since I do -- I did work there at the time. So by him saying all these things about Dorney Park -- can you scroll down?

(Pause in proceedings.)

Q. I'll have you read the last two lines. Do you remember --

A. That's what I'm talking -- referring to.

Q. Okay. So you're trying to find --

A. And that's when I was very nervous.

Q. After you read those two sentences? Or two lines I should say, or two paragraphs, whatever they may be. Okay. Did you see another one that pertained to Dorney Park that made you nervous?

A. Yes --

Q. I'm going --

[164] A. -- quite a few.

Q. I'm sorry. I'm going to show you Government's Exhibit Number 3. Can you just read that to yourself for a moment?

(Pause in proceedings.)

Q. Do you remember seeing that post?

A. I do.

Q. And was it on Anthony Elonis' Facebook page?

A. It was.

Q. And do you know how it came to your

attention or how you saw it?

A. I'm not certain but I know I saw it.

Q. All right. Now, it's dated October 22, 2010. Do you know if you saw this post at or near the time that it was actually posted?

A. Shortly after.

Q. All right. So would you agree with me that if it was October 22nd and you saw it shortly after, we're talking about what, five or so days after he was terminated from Dorney Park?

A. Yes.

Q. All right. Can you please explain the Halloween Haunt just a little bit to the jury?

A. Okay. We have several attractions they have several attractions and each one is individualized and [165] has a certain theme to it and it is meant to scare people. You're not allowed -- as actors, you're not allowed to touch the guests. You're just meant to scare them.

Q. Okay. And people dress up in costume?

A. Correct.

Q. And is the park dark?

A. Yes, and foggy. They put a lot of fog around outside through the attractions.

Q. So they use like fog machines?

A. Yes.

Q. All right. And it looks like this post was made during the Halloween Haunt period?

A. Yes, it was.

Q. All right. The halloween Haunt period I guess starts in October and ends at the end of October?

A. Yes.

Q. Okay. And did that have any impact on how you read this particular post?

A. Can you --

Q. Sure, sure.

A. Sorry.

Q. The fact that this Halloween Haunt was going on at the same time that you read the post

A. Yes.

[166] Q. -- and based on its content, did you become more or less fearful of what it said in the post?

A. More fearful because of pretty much the last line, "Whoever thought the Halloween Haunt could be so scary?"

Q. Okay. Tell me what you did, Amber, if anything after you read these -- these two posts that we've talked about. Did you alter what you did at work? Did you alter any part of your life because of what you read in these two threatening posts?

A. Yes. After reading some -- a lot of these posts I didn't go to school for two weeks. I didn't go to work the one -- the day that he was fired I didn't go to work. There was a day afterwards that I didn't go to work for fear that he was going to be there. And a friend and I had even chosen a hiding place that we could hide at if he ever did come to attack us that we could actually hide.

Q. Okay. So a friend of yours is a co-worker at

Dorney Park?

A. A co-worker, yes.

Q. All right. You picked out a place what, on the Dorney Park grounds that you could go hide?

A. Correct.

Q. And do you know when -- was it after you read these [167] two posts that you came up with that plan?

A. It was before this

Q. Okay.

A. -- but it was still due to what he had said.

Q. Did you see other messages on his Facebook account?

A. I did.

Q. I'm going to show you Government's Exhibit Number 5. Do you remember reading this threat?

A. I do.

Q. And it looks like this one, it's on your screen, it's dated November 15th, 2010.

A. I agree. Sorry.

Q. And can you tell me how you felt after you saw this on his Facebook page?

A. Even more scared. It -- like you said, a paper is not going to stop him from coming after anyone so --

Q. So would it be fair to say that you took that particular threat message as serious?

A. Yes, I took almost -- I took every one literally.

Q. Now, in the one -- did you see anything on his

Facebook account where he said things like these are fictitious or this is rap lyrics?

A. I did see that.

Q. You did. And what weight, if anything, did you attribute to seeing those types of words or combination [168] of words?

A. I didn't believe it for a second.

Q. Can you elaborate more as to why you didn't?

A. I'm afraid he'll disagree. It -- I've worked a lot with him. I know how he is as a person that I've worked with, and I know he's not lying about what he is saying.

* * *

[CROSS-EXAMINATION]

[BY MR. COOPER:]

[171] Q. Okay. You said you were on Facebook though and you would look at postings like other employees would do and everybody would be checking what other people would write, is that correct?

A. Well, this is correct. I did -- I did block him --

Q. Okay.

A. -- from my account -- from seeing my account. And at times people would tell me that they believed that the postings were about me, so I would go on and unblock and see what they were or someone would show me the comments or postings.

Q. Did you ever get any contact other than what you just described? In other words, someone might have [172] told you check something out on Facebook

but you had him blocked, so you'd unblock him and look --

A. Yes.

Q. -- and see what he had posted, is that right?

A. I did, and when I had him blocked sometimes they would bring the pictures to my attention.

Q. Okay. But was there any other contact other than the Facebook that you just described to us?

A. I --

Q. Telephone, letter, any other type of contact in that way?

A. I saw him at a party, at a Halloween party.

Q. Okay.

A. And -- do you mean after he was fired?

Q. No, I'm talk -- when you when you would look at the Facebook postings --

A. Yes.

Q. -- were there any other communications that you received from him other than -- not received from him, but any other communications that you saw or received other than what you saw on the postings on the public wall on Facebook?

A. I don't believe so. I know we had texted prior to him posting the almost threatening statements.

Q. Okay. And you had reported to supervisors that you [173] felt that Mr. Elonis was harassing you sexually. Am I correct to say that?

A. Yes.

Q. Okay. And did you report any of those

incidents to Daniel Hall? Do you know who Daniel Hall is?

A. I know who he is.

Q. Okay. Do you know what his position is?

A. He's the head of security.

Q. Okay. Did you talk to Mr. Hall with regards to anything with regards to sexual harassment?

A. I don't believe I talked to him directly, but it was supposed to -- I wasn't supposed to go in that route. I was supposed to go -- oh, no, I did. I'm sorry, I did.

Q. You did?

A. I did speak with him at one point about Anthony Elonis, I did.

Q. Okay. So you spoke -- your testimony is you spoke with Mr. Hall and you made a report verbally -

A. Verbally, yes.

Q. -- about Mr. Elonis and about sexual harassment by Mr. Elonis?

A. Yes.

Q. Is that your testimony?

A. I did.

[174] Q. Okay.

A. I did speak with him.

Q. And then at the time that you made that report to Mr. Hall was Mr. Elonis working in security?

A. He was working in security at the time.

Q. Okay. Now, you said that management didn't

do anything about what you complained about. Am I correct to say -- I'm speaking generally, but you first reported incidents and you said management did nothing. Am I correct to say that?

A. I know they had spoken with him about what had happened, but there wasn't anything that was directly done about it.

Q. Okay.

A. -- like demoting him or taking him away from the area that I was in, anything like that.

Q. Okay. Do you know if they made a report in his personnel file with regards to that?

A. I'm unaware of that.

Q. Now, you were telling us if I understand it that when he -- when the words "I wish" appeared you thought that this was directed to you, is that correct?

A. Yes.

Q. Now -- and you're -- am I correct to say that you're guessing as to that? Is that a guess?

[175] A. Yes.

* * *

[BY MR. COOPER:]

[176] Q. Okay. Just back to the -- to the times when you saw the postings. Now, did you know about the things that Mr. Elonis had written about before you saw the postings that Ms. Stephan asked you? And what I mean by that is did he post rap lyrics, for example? Had you seen him do that?

A. I don't listen to much rap.

Q. Okay.

A. So I wouldn't know if they were rap lyrics or not.

Q. Okay.

A. So I can't answer that.

Q. You can't describe it as rap lyrics?

A. No.

Q. Would you describe it as lyrics? Is that fair to say? Songs?

A. I can't answer that.

* * *

APPENDIX L

[Transcript of Jury Trial – Day 2 – October 19, 2011]

* * *

[182] COURTROOM DEPUTY: Please state your full name and spell your last name for the record.

THE WITNESS: Steven Rowe, R-O-W-E.

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MS. STEPHAN:

Q. Good afternoon, Mr. Rowe.

A. Good afternoon.

Q. Is it – is it – I'm sorry, do you go by detective or – I forget what police department your [*sic*] from.

A. I'm from the Lower Providence Police Department and I'm a detective there.

* * *

[212] BY MS. STEPHAN:

Q. I'm going to show you quickly again while the jury can see it as well. Yes, please. Thank you. These three pages, correct me if I'm wrong, but they seem to essentially be like scrolling screen shots?

A. Yeah.

Q. Is that correct?

A. Yeah.

Q. Would it be fair to say this is something you found on the defendant's computer?

A. Yes.

Q. All right. That's page one, 25A. 25B. And 25C. I'm only doing it quickly. I'll put them back up for a longer period of time. But is that basically a continous stream of what appears to be Facebook posts?

A. Yes.

Q. All right. Can you tell us a little bit more about where you found them and how you found them on the [213] defendant's computer?

A. I found them in the picture folder underneath the user area under the name of Anthony. I believe the path was User/Anthony/Pictures.

Q. User/Anthony --

THE COURT: Anthony, would it be Pictures?

THE WITNESS: Oh, it's User/Anthony/Pictures.

It was a separate folder of pictures.

THE COURT: P-I-C-T-U-R-E-S?

THE WITNESS: Yes.

THE COURT: Okay.

BY MS. STEPHAN:

Q. Okay. To -- for something to have ended up in that particular folder or can you explain how something ends up in a folder that bears that name?
A. The computer -- the computer user would have to point the file there to say you're there.

Q. Okay. So basically this would have to be something that they saw on their screen, they actively saved it, and they saved it to that specific location?

A. Yes.

Q. All right.

(Pause in proceedings.)

Q. Okay. Why don't you go ahead -- I'm trying to figure out the best way -- if you could go ahead and [214] just read to the record what is dated here. You can start with Jill's post there, please.

Do you need me to zoom in a little bit? It's a little small. Why don't I do that? I'll do one at a time.

A. Thank you. "Hi Robifer (ph), talked to Josie last night about Anthony."

MR. COOPER: I'm sorry, Your Honor, can I -- I don't mean to interrupt. Can the Court give the limiting instruction at this point?

THE COURT: Sure. Members of the jury, these are statements which are offered for a limited purpose. These are basically out of court statements, and normally an out of court statement by a person who is not here testifying is hearsay. If it's offered for a non-hearsay purpose, that is not for the truth of what's in the statement, then it's admissible.

In this case the government is offering these statements as evidence of the state of mind of the defendant and they're relevant only as to the state of mind. They're not offered for the truth of what's actually being said in these statements.

So you're to consider them only for the limited purpose of assessing what relevance to you these statements have as to the defendant's state of [215] mind at the time in question and for no other purpose. Okay?

MS. STEPHAN: Thank you.

BY MS. STEPHAN:

Q. Okay. Sir, if you could go ahead and read where you started.

A. "Hi Robifer, talked to Josie last night about Anthony. A few of my clerks had contacted me last night after he tagged them with his nasty Dorney letter. I told them to block him as a friend and report to FD. I am really concerned about his mental status. He not only lost his job but has lost all contact with the people he considered to be his friends.

Earlier this year he told Josie that he wanted to buy a gun and he has a list of Dorney employees to use it on. I hope that Dan Hall is aware that security needs to be looking out for him, not just at employee entrance but general admission too.

He could have made a couple of keys or just taken one from the property room and could get it in pretty much -- and could get in pretty much anywhere. I really think he needs professional help, but he has no family that would have him evaluated or committed.

Josie suggested that maybe he might want to talk to his wife about it. I am very worried about his interaction with his children too. I would like to see him get some help so that he can move on in his life. Poor Amber must be terrified."

Q. Okay. Just to go back, I know I do this sometimes when I read, you said "with his children." It says --I'm reading "kids." Would that be accurate?

A. Oh, I'm sorry, yes, it does say "kids." I apologize.

Q. No problem.

A. Yes, it does say "kids."

(Pause in proceedings.)

Q. I should say is the date that's attached to what you just read October 20th?

A. Yes.

Q. And, sorry, I should say at 2:31 p.m. and then this next posting seems to be by a Rob Hill dated the same date, October 25th, 2:50 p.m.?

A. Yes.

Q. It appears to be in response to what this Jill woman wrote?

A. Yes.

Q. Could you please read what's in this paragraph?

A. "Hey Jill, he definitely needs some professional help. That is basically what he is doing right now, he [217] is crying out for help and attention, but he is going about it the wrong way, hurting a lot of people, including me, in this.

"He made a comment in his letter about the people below Mindy and Keith have no value or shouldn't be part of -- shouldn't be past a ride operator. I don't care if you want to criticize my supervision B-C it doesn't matter what he thinks about it.

"In the end it's what management thinks about it. But to say I have no value after I gave him a place to sleep when things got rough with his family and a shoulder to cry on and went to visit him when he was in the hospital and letting him hold my little

girl, that's a low blow.

"I took great offense to his letter. And, actually, it's funny that your clerks were hurt by the letter B-C they were smart enough it included them by his insulting words. He basically insulted the whole department, you, me, Josie, team leaders. He didn't mention names. He didn't have to. He brought the whole department into it."

Q. It looks like that paragraph picks up on the next page on Exhibit 25B. Can you start reading this rest of this particular post for us, please?

A. "Now, do I still want to help him? Yes, B-C I [218] don't want to see anything happen to him. I don't want him to get hurt or killed, and that's the path he is going down.

"I don't want to see him hurt or kill anyone else either, and it's been eating me alive B-C I can't figure out the right thing to do. I want to talk to him but that could come back and bite me on the ass.

"I can't go to his wife B-C she's not going to care. When we went to visit him in the hospital she didn't care that he was in there. She thought it could be a complete waste of time. So she is not the right person to bring into this.

"Reporting him to Facebook is a good idea B-C of the way he is acting and saying it's offending a lot of people. I'm hopeful that chief is aware of all this stuff and aware of what is going on. I'm sure he is considering from his letters" excuse me -- "from his letter security dismissed him so they will be on the look out for him. I'm at a loss of what to do. It's been eating me alive all day and night trying to figure something out."

Q. And it looks like Jill and Matt (inaudible) respond back on October 20, 3:38 p.m. And can you please read what is in that post?

A. "I'm in the same position as you are. We are [219] watching a ticking time bomb just waiting for it to go off and don't know how to disarm it. There has to be some agency that can -- that we can alert.

"I understand that the police don't pay much attention to Amber's complaint. Without anyone to talk to right now I'm sure he is getting worse and worse. I understand that he moved to a new apartment in Bethlehem. Do you know where? Do you know where?"

Q. Okay. And then the last that you recovered on his computer, it looks like Rob Hill responded on October 20th at 3:54 p.m. Would you please read that?

A. "No, I didn't know he did that either. See, like I want to talk to him, I want to speak to him and see if there's anything I can do. But I'm afraid it only could make things worse then him end up pissed at me then attempting to hurt or harm my family. That's why I'd love to -- if there was an anonymous tip line or something, that would be great."

Q. And just to further clarify, this is something that was not something that we knew or found in unallocated space? This was an active filed saved on the computer that he could access at any time?

A. Yes.

Q. And you said that a user would have to actively save it in that pictures folder --

[220] A. Yes.

Q. -- on the computer?

A. Yes.

Q. Okay.

MS. STEPHAN: I have not further questions, Your Honor.

MR. COOPER: I have no questions for this witness, Your Honor.

THE COURT: Okay, thank you. You may step down.

(Witness excused.)

THE COURT: You may call your next witness.

MS. STEPHAN: Your Honor, as -- provided that all of my exhibits, which look to be numbers 1 through 25C, are admitted into evidence --

THE COURT: They are.

MS. STEPHAN: -- the government would rest, Your Honor.

THE COURT: Members of the jury, the government has rested it's case. It is necessary for me at this time to discuss a few legal issues with the attorneys and then we will return you to the courtroom. And this also is a convenient time to take a break. So we'll take a recess at this time. Please do not discuss the case while you're out in the jury room.

[222] MR. COOPER: Your Honor, the defense moves for judgment acquittal under Rule 29 of the criminal procedure. The government has not sufficiently proved enough for the jury to consider whether the threats were true threats as defined in the law. That is the basis of our motion. If they were

not true threats, then they are constitutionally protected under the First Amendment.

THE COURT: Thank you, Mr. Cooper. Ms. Stephan.

MS. STEPHAN: Yes, certainly, Your Honor. I think that both parties agree as to the requirement that the actual threats be considered true threats under the law.

The disagreement here, which I think Your Honor has already ruled on, is the test for determining that. I think the basis of the defendant's argument is that it must be subjective intent by the person making the threat, and obviously the government disagrees and [223] I think the Court has already ruled that that is not the test.

In this case it is based upon the reasonable recipient and the context in which the threats were received. And that is one of the factors the jury can use in determining whether or not a true threat was made.

I think the government has presented more than ample evidence to meet the burden at this particular level. Obviously we've heard from numerous witnesses who have testified to seeing what they consider threats, to being in fear of them, to making changes in their lives and taking precautions based upon them.

That obviously in connection with everything else Your Honor has already heard. So we submit there's more than ample evidence at this point in time to go to the jury.

THE COURT: Thank you. Certainly the issue

here is whether the statements contained in the Facebook postings were true threats. That is a jury question.

And the test, as referred to in the Third Circuit's decision in United States versus Kozma (ph) is the objective reasonable person test, requires that [224] the defendant intentionally make a statement, written or oral, in a context and under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm.

I certainly think on this record a reasonable jury could find the Facebook postings to contain true threats applying that standard, and there certainly is enough evidence for this case to go to the jury.

So I will deny the Rule 29 motion on that basis, consistent with our decision on the motion to dismiss. All right. Now, are you ready to proceed with your case?

* * *

APPENDIX M

[Transcript of Jury Trial – Day 2 – October 19, 2011]

* * *

[225] COURTROOM DEPUTY: Please state your full name for the record and spell your last name.

THE WITNESS: Anthony Elonis, E-L-O-N-I-S.
COURTROOM DEPUTY: Thank you.

* * *

[226] DIRECT EXAMINATION

BY MR. COOPER:

Q. Good afternoon, Mr. Elonis.

A. Good afternoon, Mr. Cooper.

Q. How old are you today, sir?

A. I'm 28.

Q. And where do you live?

A. I live in Bethlehem, Pennsylvania.

Q. Were you ever employed by Dorney Park?

A. I have been employed with Dorney Park. I was employed in 1999, in 2000, and in 2001. I left and met my wife and returned to Dorney Park in 2006, 2007, 2008, '09, and 2010.

Q. What were your responsibilities when you worked for Dorney Park? First, let's talk about in '99 and then up to the present.

A. Sure. In '99 I was a restroom attendant. In 2000 I was promoted to assistant group supervisor supervising park services. At the time it was called ecology. They deal with the sanitation at the park. In

2001 I started as a group supervisor in the -- in the park services, which was called the ecology department, and I was transferred into rides. And then [227] I left the park on a mutual -- mutual agreement. I decided to leave and met my wife. And in 2000 -- I returned to Dorney Park. I was working in warehouse. I couldn't find steady work, temp agencies. So I went back to Dorney Park because I knew I could get the hours.

In 2006 I started as a ride operator but I was immediately promoted to assistant group supervisor at the Talon roller coaster. In 2007 I was a -- they changed the name, group supervisor, to team leader. I was a team leader for the Thunder Creek Speedway ride group, which was Thunder Creek Speedway, the crazy cars and the swan moats.

In 2008 I was assistant area supervisor for the Halo, which is park services in the water park. So we -- my responsibilities were supervising the employees, the restrooms, the sanitation control, the trash cans, and sweepers or sweeperettes.

In 2009 I was again promoted to area supervisor in the rides department, back to the rides department. I was supervisor of the Baker ride group, which consisted of Dominator, Thunderhawk, Apollo, some of the smaller rides. And then I received my last promotion in 2011 as a department supervisor. I was in charge of hiring employees for the ride operations

[228] Q. Now, during this time that -- yes, sir?

A. I did want to mention I've also -- whenever the park has asked me to take on other responsibilities I have been certified as a -- in previous seasons I was

certified as a lifeguard so I helped out with the lifeguards.

And I also did the Haunt in 2009. I was talent captain. I was in charge of creating story lines for the characters in the Gauntlet, which was an attraction for the haunt. And we'll discuss that later I'm sure.

* * *

[228] Q. Okay. Now, during the time that you were employed during these years were you also married?

A. I was married.

Q. Okay.

A. I still am married.

Q. What year did you get married?

A. I married my wife in 2002.

Q. So you would have been approximately 19 at that time?

A. That's correct.

Q, And that relationship, your marriage, went from 2002 and you were together until 2010?

A, Correct. I met my wife in 2001 and we were [229] together until May of 2010.

Q. All right. And did you have children with you wife?

A. Yes, we had two children, Riley, his age is eight, and my daughter, Emma. She is seven.

Q. Okay. Now, could you please describe for the members of the jury the type of relationship you

had with your wife?

A. I loved my wife I still love my wife. We went through a lot of problems together. We were young when we met. We did emotionally abuse each other. She was more physical. You saw her on the stand -- you saw her on the stand when she became argumentative with my attorney. I got that ten times worse.

She would bite me, kick me, scratch me, anything she could. When I met her she was suicidal.

* * *

[232] BY MR. COOPER:

Q. All right. Mr. Elonis, before we left and went to sidebar you were describing the nature of the relationship --

A. Correct.

Q. -- that you had with your wife. I want to ask you a question about the year of 2010 and just before that.

A. Okay.

Q. Can you can you describe what the nature of the relationship you had with your wife was at that point in time?

A. In 2010 I thought -- in 2009 -- I'm going to back up just a little bit -- me and my wife were going through problems in the fall. I thought everything was getting better. In 2010 I did get promoted to the department supervisor position so I was responsible for more. I knew I would be away from my family a little bit more and that was always an issue in terms of how [233] many hours I had to put in to Dorney

Park.

So in March -- in March I, just for the spur of the moment, this is something I don't normally do, I just said let's just go to the beach. So I took her out to -- we just -- we just went each. We ended up in Atlantic City, but at least my kids and me and my wife got to walk on the beach, and the sunsets in the west, so it's not like a sunset over the ocean, but it was something that -- a spontaneous thing that I don't -- I never did before.

I also wanted to -- I bought concert tickets. That's something I didn't do. I wanted to show my wife that even though I was taking on this responsibility that I still was going to be there for her and that I was -- I was going to devote time to her.

* * *

[233] Q. All right. And what happened after that trip and in May of 2010?

A. In May of 2010 my wife started drinking, hanging out with her friends, going to bars. She'd dump the kids of with -- with people that I -- that looked like they smoked crack. So I -- you know, she -- she lied to me. She told me she was out with her friend, Tasha, but she was really with another guy. So, you know, it became a big issue and she decided to move in with her dad.

[234] Q. And when she moved in with her dad where were you both living at that time?

A. We were living in Topson. We had originally lived in Freenesberg. We were renting an apart -- a house from my father. But, you know, I wanted to -- she was going to leave me then and then I wanted to

make it work so I said we'll move up by your parents. And I did that for her. I would have done anything for her. And I -- I would have done anything to make it work.

Q. Okay. How did you feel when she left?

A. Very sad, very depressed. I'd say I was suicidal.

Q. Did you go for help?

A. I've been to counseling. When me and my wife fight I'm always the one to take responsibility and go to counseling. The counselors always suggest we should do it together but my wife always refused. She always said I was the one with the issues.

Q. So you did go?

A. I did go to counseling.

Q. Did you continue to work at Dorney Park?

A. Yes.

Q. Okay. So we're in May of 2010.

A. Were in May of 2010.

Q. And your wife had left?

A. My wife had left me. [235]

Q. And the children were with her?

A. The children were with her.

Q. All right. And did you work out some arrangements for custody of the children at that point?

A. Eventually, I mean it was rough. I mean we had to go back and forth in terms of, you know, her seeing other guys and -- the things that normally

happen in a custody dispute were coming out, and eventually we agreed to joint -- joint custody, and we had a custody agreement that I had -- I paid 1500 dollars for. She -- we had credit cards in her name that she asked me to pay off. I paid them off. She then came into the house and took all the cash on hand, leaving me with no money to pay for rent or any bills or anything.

Q. During that time you were posting on Facebook? A. Correct, I was posting rap lyrics.

Q. Okay. What kind of rap lyrics?

A. Things -- in terms of May, just lyrics from other -- from artists.

Q. Okay. Any particular artist that you remember? A. Eminem -- Eminem, Necro, Insane Clown Posse.

Q. Okay. And the lyrics that you posted, or the songs that you listened to, if I just generally describe them, did those songs contain words of violence?

A. Correct.

Q. And when you posted on Facebook and you posted about the rap lyrics –

A. Okay.

Q. -- tell us why you did that, okay? And what you meant when you did that.

A. I -- I was basically listening to, you know, love songs, getting depressed. I mean I started listening to more violent music and it helped me somehow. I can't describe it. But I also decided to be creative and create my own -- my own work, and I never intended to threaten everyone. I specifically put disclaimers

up there. Every step of the way there was a disclaimer. If anyone -- there were times when people did ask me what am I doing? Think of you're [*sic*] children. And I would tell them -- I would be rational and I would tell them I don't write for my children. This is for me, this is therapeutic. It helps me to deal with the pain. I'd never hurt my wife, I'd never hurt a child, I'd never hurt anyone. I wouldn't hurt Agent Stevens -- Mrs. Stevens.

[236] Q. When -- when you did -- when you did this what did you think about how other people who saw these postings would think? What was your thought?

A. What was my thought process?

Q. Yeah.

A. Like I said, I did put disclaimers up. I knew -- I knew that what I was saying was violent. I'm not going to excuse the violence, but I also knew that other people -- there's nothing that I said that hasn't been said already. So I know that other people have been able to express themselves in this way. That was my thought process. And the reason that my posts were public, the government would want it both ways. They would say -- if I made my posts private, they would say that I was specifically targeting my friends when really I had nothing to hide. I wanted everything -- I wanted transparency. I wanted everything out in the open. I wanted people to know that I just wanted to express myself in this manner and I didn't want to hurt no one, I don't want anyone to be scared, I just -- I just want to deal.

Q. During the time in the summer of 2010 and

the fall of 2010 there was a hearing involving a petition that Tara had filed, is that right?

A. That's correct, it was a Protection from Abuse [238] Order.

Q. And there was a hearing. And you attended the hearing, is that true?

A. I did attend the hearing, yes.

Q. Okay. And the judge at that hearing made a ruling --

A. Correct.

Q. -- against you, was that --

A. Correct.

Q. -- is that fair?

A. Yes.

Q. Okay. And you didn't agree with the ruling? You -

A. I did not agree with the ruling, no.

Q. Okay. Now, how did you feel after you got the ruling?

A. I posted -- I posted on Facebook that I was upset with the ruling, I said why, I gave -- I gave other artists who had posted similar stuff about -- that's all up on my Facebook. I was very upset about the PFA and -- it was upsetting because my wife had lied at the PFA hearing. Specifically, she said I threatened her the day we -- I threatened her to get married and I threatened her to have children. And she's attempted to get PFAs in the past, and if that was true, she [239] would have been granted a PFA.

Q. Okay. Now, the posting I'm going to refer to

was previously marked as Government Exhibit 4.

A. Okay.

Q. And I'm going to show it to you. It's been published. It's in evidence.

(Pause in proceedings.)

Q. Okay. And it begins with, "Hi, I'm Ton Elonis." And then it begins, "You know it's illegal for me to say I want to kill my wife." You see that, right?

A. Correct.

Q. Did you post that?

A. I did post that.

Q. Okay. And the language that you use, you posted?

A. Correct.

Q. How did you -- what is that language from?

A. What is the language from? It's from a television show called "The Whitest Kid [*sic*] You Know." It's a show that both me and my wife had watched and found funny. They deal with subject matter that is, you know, violent. They deal with subject matter that is off the wall.

Basically, in the original posting it was about killing the president or wanting to kill the president of the United States of America, and I know [240] from my research that threats against the president are specifically -- I mean that's something that's always taken seriously.

So if this gentleman can talk about killing the president of the United States of American [*sic*], then it --- it can't be illegal for me to change a couple

words around and express myself in the same manner.

Q. That was your thought process?

A. Correct, and if you look at the bottom, this wasn't read -- if you go to the bottom -- pull up.

(Pause in proceedings.)

A. I said, "Art is about pushing limits. I'm willing to go to jail for my constitutional rights. Are you?"

Q. What did you mean by that?

A. I felt that I -- I felt the -- what's called the chilling effect of the government, you know, coming and telling me what I can and cannot say. And when I -- when I -- like I said, I put disclaimers up. I wanted everyone to know that I was expressing myself this way.

These were -- these were lyrics. These -- these were for entertainment purposes only. They weren't intended for anyone to feel like I was threatening them or feel scared. I didn't want anyone to feel scared.

Q. What was your thought process about how someone who [241] read that would feel seeing that with the manner in which you posted?

A. Well, Facebook -- this is -- this is what it's -- when you post something, for instance, a link, it's not going to -- it's not going to show the whole -- all my -- all the words here. It's going to have the video as the main -- it's going to have the video for you to play it. So this is actually enlarged. So it makes the video look like it's just a small part at the bottom when in actuality, on my Facebook wall, it's the video is center stage so --

Q. So you're trying to show that you got this from that video?

A. I got -- I got -- everything that's in here, other than the parts that have been changed around to apply to my situation, from the video.

Q. All right.

MR. COOPER: Your Honor, we have an exhibit that was previously marked as Defense Exhibit 1.

Counsel has seen it. It's the video of this "Whitest Kid You Know" show.

THE COURT: Okay.

MR. COOPER: And with the Court's permission I wanted to have that played for the jury.

THE COURT: At this time?

[242] MR. COOPER: Yes, sir.

THE COURT: Okay.

MR. COOPER: I think we need to have --

THE COURT: Ms. Stephen, does the government object to the admission of this exhibit?

MS. STEPHAN: We do not.

THE COURT: Okay. So Exhibit 1 will be admitted. And you may play it for the jury.

(Pause in proceedings.)

("Whitest Kid [*sic*] You Know" video is being played at this time.)

THE COURT: Turn the volume up.

("Whitest Kid [*sic*] You Know" video is being played at this time.)

THE COURT: Can we get the volume up?

("Whitest Kid [*sic*] You Know" video is being played at this time.)

THE COURT: All right. We're fine.

("Whitest Kid [*sic*] You Know" video is being played at this time.)

MR. COOPER: Okay, thank you.

BY MR. COOPER:

Q. All right. So that is what -- that's the video that you were talking about, is that right?

A. That was the inspiration, yes.

[243] Q. And you had seen that before and your wife had seen that before?

A. Both me and my wife have seen and watched that show.

Q. Okay. And you decided to post that and substitute some language?

A. Correct.

Q. Okay. Now, when you did that you put that on the Facebook in the public --

A. Correct.

Q. -- display?

A. Correct.

Q. Okay. So that meant it would go to anyone who wanted to view it?

A. It wouldn't go to anyone that wanted to view it. You'd have to go to my Facebook to view it.

Q. Right. So if someone wanted to view your Facebook, they could get on there and see that?

A. They'd be able to see everything I posted,

correct.

Q. Okay. Now, when you were at Dorney Park --

A. Okay.

Q. -- okay, and you lost the job at Dorney Park, is that right?

A. In terms of my firing in October 17th, yes, that's correct, I did lose -- I did -- I was terminated.

[244] Q. Okay. Now, at that particular point in time when you were terminated what was your domestic situation at that point?

A. At that point I had not seen my kids, not for lack of wanting them but for the fact that the park was only open during the weekends and that was the time that I had custody. So in order to be able to support them I had to work and I told my wife I couldn't take the kids. I wanted to, but I couldn't take the kids.

I moved into my parents house around Oct -- the beginning of October and I attempted to get -- I let my wife know -- first of all, my wife lied to me. She said that the custody agreement wasn't in effect because she didn't sign it and return it to the Court.

She had tried to retain my lawyer, but obviously you can't -- they can't represent her because they've already taken me on as a client. So they called me and let me know that my wife had called to retain them. And I said well -- I -- somehow we got to talking about the custody arrangement and they informed me that actually the cust --

MS. STEPHAN: I'm going to object, Your Honor.

THE COURT: Sustained.

BY MR. COOPER:

[245] Q. All right. We'll have to move on.

A. Okay.

Q. All right. The domestic relationship at that point is that she was not with you, nor were the kids, is that right?

A. Correct.

Q. All right. And then you were terminated from Dorney Park, is that correct?

A. Correct.

Q. All right. And when you were terminated from Dorney Park there was a counseling summary written concerning that, is that correct?

A. That is correct.

Q. And you've seen that, is that correct?

A. I've seen -- I've seen the counseling summary, yes.

MR. COOPER: May I show something to him, not for the jury at this point?

THE COURT: Yes.

MR. COOPER: It will be Defense Exhibit 11. (Pause in proceedings.)

MR. COOPER: Your Honor, since we've concluded with the video, you can excuse our technical assistant.

THE COURT: That's fine, thank you. MR. COOPER: All right.

[246] BY MR. COOPER:

Q. Okay. Mr. Elonis, you have in front of you

what's been marked as Defense Exhibit 11. Do you see it?

A. I do.

Q. Do you recognize it?

A. Yes, I do.

Q. Can you tell us what it is?

A. It is the termination counseling summary that I received when I was terminated.

Q. And does your signature appear on that counseling summary?

A. Yes, it does.

Q. Okay. Is that it at the bottom? Is that your signature?

A. That is my signature.

MR. COOPER: Your Honor, I move for the admission of this document.

THE COURT: Any objection?

MS. STEPHAN: No, Your Honor.

THE COURT: It will be admitted.

(Defendant's Exhibit 11, counseling summary, is admitted into evidence at this time.)

MR. COOPER: May I publish it to the jury? THE COURT: Yes.

[247] BY MR. COOPER:

Q Now, if we could look at the paragraph, it says here that you were working in security?

A. Correct.

Q. It says, "On October 17th, 2010, it was made

aware that Mr. Elonis had posted a threatening photo/comment on his Facebook page. Another employee believed" --

A. Perceived.

Q -- "perceived the photo as harrassment." Do you see that?

A. I do see that.

Q. Okay. And is there any other reasons given for the counseling statement?

A. No, that's all. They also put that he -- I stated -- and this is true. I saved my comments for the referee, the unemployment appeal referee, and the referee will love the short document.

Q. So there were no other details given concerning the events that prompted the counseling statement, is that correct?

A. I mean I tried to explain myself but they -- they didn't -- they already made their decision so it was it wasn't worth it.

Q. And then there's another line that says what performance standards are expected of the employee in [248] the future?

A. "No standards are expected due to the nature of the incident. Discipline has been escalated to termination."

Q. So that was what was given. Are there any other reasons given for the termination?

A. No, there are not.

Q. Is there anything in there about sexual harrassment?

A. There is nothing there about sexual harrassment.

Q. Okay. Is there anything in your personnel file about sexual harrassment?

A. In terms of what they provided to the government, there appears not to be.

Q. Well, is there is the question. Whether they provided it to the government or not, is it there?

A. I'm not sure. I have no seen them.

Q. Now, because you were terminated, okay, again, what were you feeling at that time now that you had been terminated from Dorney Park?

A. I was -- I was upset about my termination, but at the same time I was happy to be free. I mean I felt that I did dedicate a lot of my time and effort to the park.

Like I said, I would do anything they asked [249] of me, like being a lifeguard. I was really proud in the summary [*sic*] of 2009 because I didn't know how to swim and both me and my daughter learned how to swim at the same time, so I became a lifeguard. I mean I was -- like I said, I was feeling happiness and sadness. I mean I loved the industry.

My intention was to go to school for business management and get into management. I had the highest seasonal position. I was responsible for hiring employees at the park last summer for the rides department.

Q. Were you sad that you lost the job?

A. I was sad, yes.

Q. Were you depressed?

A. I was depressed, yes.

Q. Okay. Now, there's been a lot of talk about postings that were made following this termination, right?

A. Correct.

Q Okay. So let's go into that.

A. Okay.

Q. Okay. You made those postings. Is that fair to say?

A. I did make those postings, correct.

Q. So what is the thought process that you're doing -- [250] let's talk about the --

A. Can we go through the postings? I'll explain every thought process.

Q. Let's look at Defense or Government Exhibit 1.

Okay, this was the posting --

(Pause in proceedings.)

Q. Now, you explained the background of what you felt, is that right?

A. What I felt?

Q. Yeah.

A. Just sadness mixed with relief, and I just wanted to, you know, let everyone know -- you know, I wanted to say goodbye to the employees that I cared about. If we can, I'd like to read the note.

Q. Well, it's been read a lot, so let's go into certain portions of it.

A. Okay.

Q. Okay? Looking at the end, where I, you know,

have that, those last two.

A. Yes.

Q. That's -- that's where all the fuss is, right?

A. That's where the fuss is, yes.

Q All right. So let's talk about that. I want you to explain to the jury what's going on here. What are you trying to say?

[251] A. I can't really talk about that without talking about the entire note. If you read the entire note, you'll see that I'm talking about lawsuits, I'm talking about my termination, I'm talking about, you know, in terms of the allegations against me, I did not see any of the incident reports but I did know people were complaining. I didn't know that there were any official incident reports. But I know people were complaining and over silly stuff. Like, for instance, it was one of my job responsibilities to make sure that the employees conformed to grooming guidelines, so if I see someone with a tongue ring, I'm going to ask them do you have a tongue ring? That's not sexual harrassment. I would walk around smiling. I was crying because I lost my family and people were -- they made me feel -- they said they felt uncomfortable by me crying, but I would walk around with a smile on my face and I would still do my job to the best of my ability.

I want to -- I want to go to the line immediately before that and I said, "When I stood up before you at orientation" -- I did orientations in front of 300, 400 employees. "When I stood up before you at orientation and spoke of the need to watch your water because I didn't want my children at the bottom [252] of your pool" -- I did orientation for the

lifeguards, the ride operators, and the park services, which is the sanitation -- "and the need to be vigilant at your rides because I didn't want to respond to an incident where you had been seriously injured or killed the tears in my eyes were real."

I told them that that's one of my biggest fears is that somebody would get injured on the job or get hurt. There's not many employees that have the same passion and devotion that I had for that place.

Now, when I say, "Someone once told me that I was a firecracker," I'm talking about my personality, similar to ACDC, you know, "TNT, I'm dynamite, TNT, I'm going to win this fight, TNT, I'm a power load, TNT, watch me explode." "Someone once told me I was a firecracker. Nah. I'm a nuclear bomb and Dorney Park just tucked with the timer." And then I have a smiley face which has the tongue sticking out, which means jest. I'm not -- I'm not saying I'm going to hurt anybody. I'm just saying that this is my personality, you know.

"If I was the general manager, I'd be on the phone with Sandusky discussing a damage control plan." I'm not talking about bodily injury. I'm talking about a damage control plan. If you're suing a company, they [253] run damage control. There's nothing in that statement -- I never intended anything in that statement to be bodily injury, never.

Q. Did you understand the symbol, which is the smiley face -- was it your understanding that other people understood that symbol?

A. Correct, I believe everyone understands what they are. They are modicons [*sic*]. They are just symbols for to give your statement context.

Q. Now, other than this posting, or the Facebook postings that are in discussing here --

A. Yes.

Q. -- as far as any communications to anyone at Dorney Park or any writings, is there any other writings that you do, letters, telegrams, e-mails, anything like that?

A. To people?

Q. Yes.

A. No, there was never any direct communication. This is all on my wall.

Q. Okay. So that was what -- that was how you communicated --

A. Correct.

Q. -- is that correct?

A. Correct.

[254] Q. Now, if you look at the second one --

A. Okay. Let's look at the second one. (Pause in proceedings.)

Q. You said up front that this is a disclaimer.

A. Correct.

Q. And fictitious lyrics and all those things. Okay.

A. Okay.

Q So what -- again, what are you trying to do here?

A. What am I trying to do here? I just read that note to you guys and from that note people were saying that as the government's last evidence that I

needed to be committed and that there was something wrong with me and I couldn't -- I couldn't figure it out.

I mean, you know, it was very upsetting to me. It was upsetting to me to lose my job -- or not lose my -- it was upsetting to lose my job. It was upsetting that I felt forced to take a demotion because of overreactions.

And also, at the same time I like rap music and there was this new article about the ACLU suing the Pennsylvania School District over expulsion of middle school rapper for songs at the high school. And in that decision the judge said that specifically

MS. STEPHAN: I'm going object, Your Honor MR. COOPER: Well, you --

[255] MS. STEPHAN: -- to what the judge said in the decision.

THE COURT: What's the objection?

BY MR. COOPER:

Q. You knew about the lawsuit?

MR. COOPER: I can -- I'll rephrase it?

BY MR. COOPER:

Q. You knew about this lawsuit?

A. I knew about this lawsuit, yes.

Q You knew about it before you did this posting?

A. I knew about it before and I was writing rap lyrics before this, some including sexual references, others drug use and, you know, the normal stuff.

Q. Okay. And this is on the Facebook?

A. This is on Facebook.

Q. Now, when you wrote this posting, okay, and you explain where -- what information you had what are you trying to accomplish when you write this? What are you trying to do?

A. I just want -- I just people to leave me alone. I just want people to leave me alone and stop causing problems in my life. I was writing offensive lyrics and that had dual purposes.

It helped me to heal the pain I was going through and it pushed people away that caused problems, [256] people that said things about me that weren't true. It pushed them away. If you understood who I was as a person, this wouldn't -- this wouldn't offend you. And I was very specific in terms of what I was saying.

I didn't -- I didn't say Dorney Park in there. I'm talking about planes crashing but there is nothing about bodily injury. There is nothing in there to indicate that I'm going to injure employees or patrons of Dorney Park and Wild Water Kingdom.

Q. If you look at number 5, this is the one about, "Fold up the PFA and put it in your pocket." You see that, right?

A. I do see that one, yes.

Q. Okay. Could you explain there about freedom of speech?

A. I do have the disclaimer that's from Wikipedia that's the -- the Baptist Church that opposes homosexuality and they have "Thank God for dead miners," "Thank God for dead soldiers," and the like.

Q. Okay. Now, again, what are you thinking when you're doing this?

A. I'm just writing -- I'm just writing lyrics. I was upset about the PFA. I never hurt my wife. I would never hurt my wife. I thought it was ridiculous. My wife had -- she never even tried to talk to me and ask [257] me. I would have told her listen, I'm not -- I'm not trying to hurt you.

She knew that I was into rap music and there's nothing that hasn't been said before. In terms of the truth read jurisprudence, I've researched the law. "Prison time will add zeros to my settlement, which you won't see a lick." My daughter told me a story. She told me that she had walked in -- she came out of the bedroom and she saw mommy with a man. His name was Alex Manns.

MS. STEPHAN: I'm going to object, Your Honor.

THE COURT: Sustained.

THE WITNESS: It's in the statement.

BY MR. COOPER:

Q. We'll move on.

A. Okay.

Q. The songs -- well, when you say you've seen it all before, there are songs about domestic violence, is that right?

A. There are songs about domestic violence. There are songs about killing police officers.

Q. And you are using the tone of that in your -- in your message?

A. I'm using the tone of that in my messages. I'm [258] being controversial. I'm trying to be outrageous, I'm trying to be shocking, but I'm not trying to threaten anyone. And I'm using a

pseudonym, Ton Dougie, and I have a disclaimer everywhere on my Facebook that it was for entertainment only.

* * *

APPENDIX N

[Transcript of Jury Trial – Day 3 – October 20, 2011]

* * *

[3] ANTHONY DOUGLAS ELONIS, Defendant, Previously Sworn, Resumes.

DIRECT EXAMINATION

BY MR. COOPER:

Q. Where we left off yesterday, I was trying to talk to you about some songs by Eminem, do you remember that?

[4] I believe so, yes.

Q. Okay. And it would be fair to say that that person is a rap artist that you have listened to in the past, is that right?

A. That is correct.

Q. And listened to many times, am I correct to say that?

A. That is correct.

Q. I want to show you a couple of documents that have previously been marked and shown to counsel and ask you to identify them. They are Defense Exhibits 7, 8, 9 and 10.

MR. COPPER [*sic*]: May I approach, Your Honor?

THE COURT: Yes.

BY MR. COOPER:

Q. Mr. Elonis, I've handed you what has been marked previously for identification as Defense Exhibits 7 through 10. Take a look at them and see if

you recognize them?

(Pause in proceedings.)

A. I do recognize them.

Q. All right. What are they, sir?

A. They are song lyrics from Eminem, "Guilty Conscious [*sic*], Kill You, "Criminal," and "97 Bonnie and Clyde."

[5] Q. And you're familiar with those lyrics?

A. I am.

Q. And how are you familiar with those lyrics?

A. I've listened to Eminem since he first came out, so I've listened to him since. I have the Marshal -- I have the Slim Shady LP, the Marshal Mathers LP in my collection.

Q. Okay. Now, how would you describe in your words --

A. A beautiful collection.

Q -- the type of lyrics that you heard from this artist?

A. He rhymes about basically anything, domestic violence, killing people, killing kids and the like.

Q. And is that type of description that you just gave contained within those songs that were just marked and identified as Defense Exhibits 7, 8, 9 and 10?

A. That is correct.

MR. COOPER: I move for their admission.

THE COURT: Any objection?

MS. STEPHAN: Your Honor, I am objecting to

the songs lyrics being admitted and given to the jury, yes, Your Honor.

THE COURT: Well, I will admit them, we'll discuss whether they go out with the jury.

[6] MS. STEPHAN: Very good. Thank you, Your Honor.

MR. COOPER: Understood.

(Defendant's Exhibits 7, 8, 9 and 10, lyrics, are admitted into evidence.)

BY MR. COOPER:

Q. The songs themselves, okay, did you use any wording from those songs to write your lyrics that you wrote, especially with pertaining to the items that are the subject to this case?

A. There were times when I used the lyrics from him. There were also times when I used the content. For instance, he rhymed about a Columbine shooting in first person perspective, so that was the inspiration for the kindergarten school shooting post that was on my Facebook.

Q. Okay. When you say "inspiration," what do you mean by that?

A. In terms of, like I said, I had been rhyming on my Facebook since May of 2010, and I took inspiration from the music that I was listening to.

Q Let me hand you what has been marked for identification as Defense Exhibit 2.

MR. COOPER: I'll show it to counsel.

(Pause in proceedings.)

[7] THE COURT [*sic*]: May I approach, Your

Honor?

THE COURT: Yes.

BY MR. COOPER:

Q. Sir, I've handed you what has been marked for identification as Defense Exhibit 4 --

A. Okay.

Q. -- 2, I'm sorry. Do you recognize that?

A. Yes, I do.

Q. What is that, sir?

A. That is my Facebook wall.

Q. What is on the Facebook wall in that exhibit?

A. At the top it lists taking a few old ones out of the closet, a few old rhymes. It doesn't show all of them. Then I parodied Bo Burnham, "Art is Dead." Then it goes into the school shooting rhyme that the government is using against me, which one of my friends did like.

Then there's another rhyme about Christmas and Love is Dead, and then there's a scene from the Toxic Avenger. This all goes, this is in reverse order chronologically. It would be that and then, what what I just listed, it would be reverse order chronologically.

So the first thing that would be on there is a scene from the Toxic Avenger.

[8] Q. What is that, Toxic Avenger?

A. It's a movie. It's an offensive movie. Troma Entertainment, they're B movies out of New Jersey. Lloyd Kaufman produces them. In this scene it shows a group of people, four, driving a car and

they're basically trying to run people over and kill people for points.

He uses some -- the driver uses some offensive racial language, and then they find a kid on a bike and the driver says, "How much for a kid on the bike?" I forget how many points the woman says.

You see them run over the kid. The kid flips over the hood of the windshield of the car. They stop. You see the kid still alive crawling on the ground and the woman in the passenger's seat in the front, she says, she states, "You don't get any points if he's still alive."

So then you see the car, I'm not sure if it reverses or if they pop a 360 or a 180, rather, and then you actually see the kid's head being crushed under the tire.

And then afterwards they all get out, they take a Polaroid camera and take a picture of the carnage, and at that point the driver says, "I want to" -- they get back in the car, the driver says, "I want [9] to do it again, I want to do it again," but the guy in the back says, "Well, I can't, I got to go to church."

So it's basically making a joke about child murder.

Q. That's the way you interpret it?

A. That's the way I interpret it, yes.

Q. And why is that important?

A. Because it helps to explain the context of the post that was posted on the same day -- let me see the time difference. I can't tell from this document, but it was the same day as the school shooting.

Q. Okay.

A. So I was using child murder -- like I said, I worked in the Haunt, and I was -- that costume that you see me in, I was a child murderer so I had to come up with line that related to that. So this is not a subject that I haven't done before.

Q. Why were you doing it on that particular day?

A. I mean I had watched the Toxic Avenger that day. I saw the kid on bike scene and I decided to do -- use that content in my Facebook.

Q. And when you decided to use it, do you remember why you decided to use that content in your Facebook?

A. Because it was controversial.

[10] Q. And why did you think it was important, or why did you want to put something controversial on the Facebook like that?

A. Because I just wanted to be creative. You know, it just -- it was violent subject matter, but there was violent imagery, but there was no violence intended ever.

Q. What did you think about, if at all, what other people might think and see?

A. You know, I didn't really care what other people thought My wife said it best, it's her Facebook, it doesn't matter what she posts on it.

Q. Now, let me direct your attention to some other documents pertaining to what you had written in the past.

A. Okay.

MR. COOPER: I mark these two as Defense

Exhibits 4 and 6. I'll show them to counsel.

(Pause in proceedings.)

MR. COOPER: May I approach, Your Honor?

THE COURT: Yes.

BY MR. COOPER:

Q. Sir, I've handed you what's been marked for identification as Defense Exhibits 4 and 6. Would you take a look at those and tell us what they are? [11] A. They are from my Facebook. Again, it's my wall. One of them is a note, and one of them is from my actual wall and they're all rhymes, they're both rhymes.

Q. Okay. Now, are these the types of rhymes you were posting on your Facebook?

A. These are the types these are the types of rhymes I was posting on my Facebook. I explore lots of subject matter, murder, rape, drug use, sexuality.

The reason -- basically as you saw, we have witnesses come up and testify to my bad character, and I mean it's not true. So the government is trying to paint me as a monster.

A monster, when you're a monster, you set the bar pretty low, so you really don't care what people say or think about you. So I was just -- I'm no monster, I'm not more a monster than Robert Englund is Freddy Kruger.

I just wanted people to stop talking about me. You know, and if they were going to say really -- you know, lie, start lies and rumors, I would just -- you know, someone who knew me knows that I'm never going to hurt anyone.

Q. All right. When the FBI came to the house, do you remember that?

[12] A. I do.

Q. Okay. And they came, they spoke to you and they left?

A. They did, yes.

Q. All right. And after that you posted some language on the Facebook, do you remember that?

A. I did.

Q. Okay. And I want to direct your attention to that if I may. I just to need to display that.

This was marked before as Government Exhibit 7. I want you to take a look at that for a minute, okay?

A. Okay.

Q. Okay. You wrote these words, correct?

A. Correct.

Q. Now, when you came out to talk to the FBI A. Okay.

Q -- what clothes were you wearing that day?

A. I was wearing a shirt, a tee-shirt and a pair of jeans, I believe.

Q. Okay. So you wouldn't call the bomb clothes, right?

A. No. You could tell if I had explosive on them.

Q. So this writing here you say, "Cause little did you all know I was strapped with a bomb." [13] What are you doing here?

A. Again, you know, murder, cop killing is not a

subject that hasn't been approached before. I was upset about the FBI coming to my door, you know, it's an upsetting thing.

This post was violent again. It's violent imagery. No actual violence was intended. I even said, if you believe any of this, then, you know, it's a common cliche, or metaphor, I have a bridge to sell you, you know. So I -- right there is the fictitious nature of the post.

And immediately after this I also posted a rhyme about the FBI that was sexually offensive that had no -- nothing of violence in it.

Q. Well, it said, "Cause little did you all know I was strapped with a bomb. Why do you think it took me so long to get dressed with no shoes on."

It only took a couple of minutes for you to come out, right?

A. That's correct.

Q. So again what are you trying -- what are you saying? I mean what is -- what is your purpose with your writing that?

A. To -- I'm using elements of my life fictitiously to -- it's therapeutic for me.

[14] Q. And at the end where it says, "If you really believe this," the last two lines there, it says, "And if you really believe this blank, I'll have some bridge rubble to sell you tomorrow." Is that what you were referring to?

I mean that -- the conclusion is, if you believe this?

A. Yeah.

Q. Okay. So that's the message that you were saying --

A. Correct.

Q. -- as far as you were concerned?

A. Correct.

Q. All right.

MR. COOPER: May I have a moment, Your Honor?

THE COURT: Yes.

BY MR. COOPER:

Q. Okay. The "I wish photo" --

A. Correct.

Q. -- what is -- it says, "I wish" on the photo. Who put that there?

A. I did.

Q. At the time, at that time that you posted that photo, were you attending any school?

A. I was not.

[15] Q. Were you planning to?

A. Yes, I was.

Q What were you planning to do?

A. I wanted to go into the theatre program at Northampton Community College because I really like the Halloween Haunt experience, I liked acting and I wanted to go into the arts and entertainment field.

Q. Okay. Daniel Hall, you remember him testifying?

A. I do remember Daniel Hall testifying.

Q. Now, you knew Mr. Hall from being an employee at Dorney Park, is that correct?

A. I knew him, I knew him from being an employee at Dorney Park, but I also knew him socially --

Q. Okay. When you say you knew him socially, what do you mean?

A. We would go out to bars and clubs together.

Q. Okay. You and he alone or with people?

A. With other people.

Q. Work people?

A. There were work people, yeah.

Q. Okay. There was -- yesterday, the subject came up about conversations by Rob Hill and Jill Matlock, do you remember that?

A. Yes, that's true.

Q. And the forensic examiner showed the jury those [16] conversations --

A. Yes, he did.

Q. -- and he said he found them on your computer?

A. Yes.

Q. Did you see that stuff?

A. I did see that stuff, yes.

Q. Okay. And you accept what they say?

A. No.

Q. Is it true what they say?

A. No.

Q. Did you talk to any of these two people, Rob Hill or Jill Matlock about your problems that you were having domestically?

A. They both knew that I was going for a separation. They both knew I was taking it hard, but they never -- Rob Hill, in the beginning when he said he gave me a place to sleep, that was one night. It was like a sleep-over, we ate pizza and I crashed on a bed in his brother's room. So, I mean, it's embellishing a little bit to say he gave me a place to sleep.

I mean I was going through pain, but I don't take the needing to be committed or anything like that. They really didn't know me.

Q. Okay. In relation to the postings

A. In relation to the postings --

[17] Q. -- did you send any other types of communications other than postings?

A. There was no direct one-to-one communication between me and any of the persons named as victims in the indictment.

Q. Was there any other communications whether it's direct or indirect other than the postings?

A. Related to the Jill Matlock-Rob Hill issue?

Q. Well, related to the counts that you're charged, to Daniel Hall, to the people at Dorney Park, to Tara Elonis --

A. No, there's no --

Q. -- to the FBI, to any kindergarten school, anything like that?

A. No, there's no communication.

* * *

[22] CROSS-EXAMINATION

BY MS. STEPHAN:

Q. You were fired from Dorney Park, you've already admitted, it that fair to say?

A. I was terminated from Dorney Park, that is correct.

Q. That was October 17th, 2010?

A. It was October 17th of 2010.

Q. You haven't worked there since?

A. No, I have not.

Q. Now, you had a Facebook page, it's pretty much clear that that's the case?

A. That is correct.

Q. And you frequently used that Facebook page?

[23] A. I did frequently use Facebook, yes.

Q. Almost every day?

A. Almost every day, yes.

Q. And many times a day?

A. Many times a day, yes.

Q. You kept your Facebook account public?

A. I did keep my Facebook account public.

Q. Which meant that anybody who was a Facebook user could see what was on your particular page?

A. Anyone who wanted to view my Facebook could search for my name, click on my name and

visit my Facebook, yes.

Q. So the answer is yes?

A. Yes.

Q. And you had a list of friends that maybe were several hundred, would that be fair to say?

A. There were near three, maybe 400.

Q. And a large portion of that consisted of Dorney Park employees, some of your co-workers?

A. There were Dorney Park on my friends' list, yes.

Q. So when Daniel Hall counts that there were at least 75, that would be accurate?

A. I would believe so.

Q. Now, prior to being terminated, you had some problems at Dorney Park?

[24]A. There were a few issues at Dorney Park in the summer of 2010, yes.

Q. And some of those issues were, in your opinion at least, caused by Amber Morrisey?

A. I did not say that.

Q. Do you believe she made complaints against you?

A. I do not have that knowledge, no.

Q. You didn't say that on your direct examination?

A. No, I didn't.

Q. You don't remember saying that?

A. That was yesterday, I don't believe I said that.

Q. You don't. Okay. And now you did post a message attached to her photo saying, "I wish," correct?

A. That is correct.

Q. And you did post a message on your Facebook account in reference horses kicking somebody in the head, is that correct?

A. That was not in discovery, no.

Q. You don't -- I'm not asking you what's in discovery. What I'm asking you is what you remember from your Facebook account, what you posted?

A. It's not there and I don't remember ever -- I don't remember ever commenting on that.

Q. Okay. We'll come back to that in a little bit.

A. We can, yes.

[25] Q. Now, obviously you were not happy when you were terminated?

A. I was upset, yes.

Q. And you didn't like the fact that they terminated you, would that be fair to say?

A. I didn't like the reason that they terminated me.

Q. And that reason was explained to you the day of your termination was a Facebook post that you made?

A. It was a Facebook -- it was the picture that I posted taken out of context.

Q. And you had what they call a counseling summary at the time that you were fired, correct?

A. There was one counseling summary in my file for 2010.

Q. And this has already been admitted through your attorney as Defense Exhibit 11. And at that counseling summary it was attended on this list by A. Jones, would that be Ann Jones?

A. That would be Ann Jones.

Q. M. Geiger?

A. Michele Geiger, she's a lieutenant.

Q Yourself?

A. And myself.

Q. Okay. And you already admitted that they told you on that date that they became aware that you posted a [26] threatening photo or comment on your Facebook account? That's what it says there, yes or no?

A. It says if you could minimize it a little bit, shrink it in.

Q. Why don't I read it to you, and you tell me if it's yes or no if that's what it says.

"On October 17th, 2010, I was made aware that Mr. Elonis had posted a threatening photo/comment on his Facebook page. Another employee perceived the photo as harassment."

A. Okay.

Q. Yes or no, is that what it says?

A. It does say that. Another employee perceived it as harassment, and --

Q. I said, yes or no, is that what it says?

A. Yes.

Q. So you're saying you were or you were not angry at Dorney Park?

A. I was angry that I was terminated. I was relieved because I did give a lot of my time and effort, a lot of the time that I should have been devoting to my family, to the park, but I wasn't angry to the point of threatening anyone.

MS. STEPHAN: Your Honor, at this time pursuant to our sidebar discussion I would like to [27] introduce into evidence Government's Exhibits Number 26 through 32.

THE COURT: Any objection?

MR. COOPER: No, Your Honor.

THE COURT: 26 through 32 will be admitted. (Government's Exhibits 26 through 32, documents, are admitted in evidence.)

BY MS. STEPHAN:

Q. I'm going to show you Government's Exhibit Number 30. Yes or no, is the author of this post yourself, Anthony Elonis?

A. That is correct.

Q. And is the date of this post, yes or no, October 22nd, 2010?

A. That is correct.

Q. Does it read, "If you couldn't tell, I'm on a mission against Cedar Fair. Fuck them mother fuckers"?

A. It does.

Q. And Cedar Fair is the parent company of Dorney Park?

A. Cedar Fair Entertainment Company is the parent company of Dorney Park, correct.

Q. Now, prior to you being terminated and you were informed of that Facebook post, didn't Ann Jones reprimand you about something else you put on your[28] Facebook account.

A. I had seen Ann Jones in terms of issues -- it was very vague.

Q. All right. Let me just stop you right there. Here's the question. Prior to your termination on October 17th, did Ann Jones reprimand you for prior postings on your Facebook account, yes or no?

A. I wouldn't say reprimand. I mean I could discuss the --

Q. Did she talk to you?

A. I will answer the questions the way that I feel they should be answered.

Q. No, you will answer the questions that I ask.
A. I can't give a yes or no.

Q. Did you have a discussion with Ann Jones about a Facebook posting prior to your termination date?

A. Yes, I did.

Q. Thank you. Now, we talked a lot about your wife.

A. We did.

Q. And you proclaim that she's someone that you still love --

A. I do love my wife.

Q. -- and would never do anything to harm her?

A. I never laid a hand on her.

Q. And you don't want to make her upset?

[29] A. No more upset than she's made me.

Q. I see. So you don't love her as much as feeling like you need to kind of toy with her and play with her and antagonize her a little bit. That's okay under your definition of love?

A. No more antagonizing than she's done to me.

Q. All right. Well, let's look at some of the things that you've sent to your wife.

I'm going to show you Government's Exhibit Number 31. Yes or no, this is dated November 18th, 2010?

A. That's correct.

Q. And you agree that you had a PFA order issued against you protecting your wife and two children on November 4th, 2010?

A. That's correct.

Q. And this reads, "There's no order that prevents me from talking about my wife. The order only prevents from contacting her, which brings me to the first of many legal and illegal statements.

"Number one, Tara Louise is a dirty, filthy cheating whore is a legal statement. Tell Tara Louis she's a dirty, filthy cheating whore is an illegal statement."

Yes or no, you posted that on your Facebook [30] account?

A. I did. It was linked to something on Youtube.

Q. Yes, you posted it on your Facebook account?

A. And it was linked to something on Youtube.

THE COURT: Answer the question.

THE DEFENDANT: Yes, and it was linked to something on Youtube.

BY MS. STEPHAN:

Q. I'm going to show you Government's Exhibit Number 32. Would you agree with me, yes or no, this date is October 22nd, 2010?

A. That is correct.

Q. Do you agree with me it says, "Revenge is a dish best served cold with a delicious side of psychological torture"?

A. It says that.

Q. And that was posted on your Facebook account?

A. Yes, it was.

THE COURT: What exhibit number is that?

THE DEFENDANT: There were comments to that post as well.

MS. STEPHAN: There is no question before you. 32, Your Honor.

THE COURT: Thank you.

BY MS. STEPHAN:

[31] Q. I'm now going to show your Government's Exhibit Number 12.

(Pause in proceedings.)

Q. At the top would you agree with me it says, Anthony Elonis?

A. Correct.

Q. And then follows that, "If I only knew what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek and made it look like rape and murder." A. That's a --

Q. Did I read that correctly?

A. That's a rhyme that you read correctly, yes.

Q. And would you agree with me that Toad Creek is an actual creek that was close in proximity to the apartment you shared with your wife?

A. At the time I wasn't sharing it with my wife but, yes, she did live there.

Q. And there was a creek by her house named Toad Creek?

A. Yes, yes. All written in past-tense as well.

MS. STEPHAN: Government's Exhibit 13. (Pause in proceedings.)

BY MS. STEPHAN:

Q. Right there it says your name, correct, Anthony [32] Elonis?

A. That is me.

Q. And it says, "Fuck you, mommy! LOL," is that correct?

A. "LOL," yes.

Q. And then farther down your name, Anthony Elonis, correct?

A. That is correct.

Q. And the post reads, "Tell Reilly he should dress up as a matricide for Halloween. I don't know what this (inaudible) though, maybe your head on a

stick." And then your version of stick your tongue out face.

A. The emoticon, it's sticking out a tongue indicating gist [*sic*].

Q We don't need you to explain. Is that what your post says?

A. Yes.

Q. And then Tara, your wife, posted a description or a definition of what matricide means.

A. Yeah, and she's not my mother.

Q. Would you agree with that definition?

A. She's not my mother.

Q. Your wife.

A. She's my wife, but she's not my mother.

Q. She's your children's mother, correct?

[33]A. She is.

Q. Yes. And you were referring to --

A. But it says, "The act of killing one's own mother --

Q Let me ask --

A. -- you want me to read it. You asked me to read it.

Q. I will ask the questions.

THE COURT: Wait for a question, please.

BY MS. STEPHAN:

Q. Tara posted the definition of matricide being the act of killing one's own mother versus who kills his mother?

A. That's correct.

Q. That's correct.

A. There's more to it. That's just 22 hours ago. The conversation went on.

Q. There's no question before you, Mr. Elonis. Now, the post before that you say, "Your child should dress up as a matricide," correct?

A. As a joke, yes.

Q. And your child's mother is your soon to be ex-wife?

A. Correct.

Q. Thank you.

MS. STEPHAN: Government's Exhibit Number 14.

[34] BY MS. STEPHAN:

Q. You would agree with me the top post says, Anthony Elonis, your name?

A. That's correct.

Q. It says, "If there's any truth to these lyrics, don't they cut like knife. Fuck you, bitch. All I wanted was a wife and a family to call my own. Now, I'm living in the zone saying fuck this world like it owes me money and I'm going to make it pay."

A. It says that.

Q. Thank you.

MS. STEPHAN: Government's Exhibit Number 15. BY MS. STEPHAN:

Q. That's your name again, right, Anthony Elonis?

A. Correct.

Q. It says, "There's one way to love you, but a thousand ways to kill you, and I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts.

"Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave, I used to be a nice guy, then you became a slut. I guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can say, forgive you."

[35] Q. That's what it says, correct?

A. It says that with a disclaimer that you didn't read.

Q. You wanted to be arrested, didn't you?

A. Not really.

Q. Not really?

A. Not really.

Q. You posted otherwise.

A. I had posted that I would be interested in taking the government to trial.

Q. Ah, exactly. Okay. Well, let's look at some of that.

MS. STEPHAN: Government's Exhibit Number 26.

BY MS. STEPHAN:

Q. You agree that it's dated October 23rd, 2010, correct, yes or no?

A. Yes.

Q. And it says, "As far as I'm concerned phase one is complete, cause (inaudible), Facebook and Dorney Park are all buzz words for money and publicity"?

A. That's true.

MS. STEPHAN: Government's Exhibit Number 27. BY MS. STEPHAN:

Q. Do you agree with me on October 23rd, 2010 is the date of this post?

[36]. That is correct.

Q. And it says, "Sorry, Corporal Negron of South Whitehall Police or PD. I don't talk to cops unless I'm under arrest, after I've had an attorney appointed by the county, but before you press any charges, you better think this out.

"Does Lehigh County know how expensive this case is going to be, because I've got my sights set at the federal level. I ain't a legitimate threat and I ain't gonna quit."

Q. You posted that, correct?

A. Uh --

Q. Yes or no?

A. Yes.

Q. And that's what it said?

A. It said that.

MS. STEPHAN: Government's Exhibit 27A. BY MS. STEPHAN:

Q. It says, "Tone Dougie," correct?

A. It does.

Q. And that is a name you convert -- you changed from Anthony Elonis to Tone Dougie?

A. I did, it's an on-line persona.

Q. So that's your name, Tone Dougie on Facebook account?

[37] A. On Facebook it's an on-line persona, yes.

Q. This post is dated October 23rd, 2010, correct?

A. It is.

Q. And it says, "Well, you've got this one all wrong because I actually got a hard-on when I listened to the voice (inaudible) South Whitehall. I love controversy, bitch."

A. It says that.

Q. And that was your words and your post?

A. Yes, to a comment through another post.

Q. There's no question.

MS. STEPHAN: Government's Exhibit Number 28.

BY MS. STEPHAN:

Q True this is dated November 4th, 2010?

A. Correct.

Q. And once again you got a PFA ordered against you on November 4th, 2010?

A. That's correct.

Q "Since I can't pen my own works, I'm going to let other artists do my dirty work. I may be the only man arrested for posting rap lyrics on Facebook. Bring it. I have a feeling I'll be laughing all the way to the bank."

A. It says that, yes.

Q. You had testified that Rob Hill, those posts that [38] you heard the forensic examiner read yesterday --

A. Yes.

Q. -- that you obtained from somewhere on the internet apparently?

A. I obtained them from on the internet.

Q. Okay. And you actually took the opportunity to save them to a folder on your computer, correct?

A. I did save them to a folder on my computer, yes.

Q. And that was an exchange on Facebook between Rob and a woman by the name of Jill, correct?

A. Correct.

Q. And you testified on your direct that you and Rob didn't even know each other all that well?

A. We didn't. I mean in terms of -- we knew each other well prior to me being switched over to security, but we had a falling out.

Q. Okay. You had a falling out?

A. Yeah.

Q. But you actually listed him on your application for Dorney Park for the 2010 season as a reference for you, didn't you?

A. I did. I said we used to be close, then we had a falling out.

Q. And a falling out was, as he explained in his post, because of your conduct?

[39] A. In terms of the conduct he was referring to, I'm not sure, but that's what he stated, yes.

Q. There's many people who expressed to you they didn't like what you were posting, correct?

A. I wouldn't say many.

Q. Rosemarie Quatierra (ph)?

A. Rosemarie was one.

Q. Rob Hill?

A. Yeah.

Q. Jill, I think her name was Matlock?

A. Yeah.

Q. There's Amber, she expressed that to you directly, didn't she?

A. No, no she didn't.

Q. Oh, she never expressed it to you directly?

A. No, she was not a friend on Facebook.

Q. In fact, Rosemarie posted a post to you basically or, she posted a post to her friends on Facebook telling you that she considered you a threat, and then someone forwarded you that posting, correct?

A. Correct.

Q. So you saw that?

A. Those weren't her exact words, but I saw that post, yes.

Q. Okay.

[40] A. And the person that sent it to me said it was ridiculous. There were comments --

Q. There's no question.

THE COURT: Wait for a question, Mr. Elonis.

THE DEFENDANT: Okay.

BY MS. STEPHAN:

Q. Now, you testified on direct a couple of different ways.

MR. COOPER: Objection, Your Honor, as to characterizing the testimony.

MS. STEPHAN: I'll rephrase it, Your Honor. That's fine.

BY MS. STEPHAN:

Q. You testified that you didn't care what other people thought, correct?

A. Really -- really, I didn't care what other people thought.

Q. That was what you said.

A. If you didn't know me --

Q. Yes or no, you testified you didn't care what other people thought?

A. I said that, yes.

Q. Okay. Let's examine some of the post that you claim are fictitious and rap lyrics and put your so-called version of disclaimers, okay.

[41] A. Okay.

Q. Now, we already know through various pieces of testimony including your own that you were fired on October 17th, correct?

A. That's correct.

Q. You left the park making a statement at the

time that you had no comment at your termination, but basically wait for the referee and wait for the short document?

A. Saying that the referee would love the short document, yes, because as a department supervisor I was schooled on the need for a good case record. You can't just fire someone with little, you know.

Q. Are you done?

A. Yes.

Q. You're done? Okay. Let's look at Government's Exhibit Number 1.

Now, you testified to this at length, or at least to some extend on direct examination, basically talking about all the things you put in there and how true they were, and how you felt about the park --

A. Correct.

Q. -- and about people at the park --

A. Correct.

Q. -- so all of that was not fictitious, not lies, [42] that that was from your heart, correct?

A. I would say so, yes.

Q. All right. But then you get to the last

A. This particular posting.

Q. -- two lines, all of a sudden it's no longer, it's no longer what you feel from your heart. That's the fictitious part, the part that you're on trial for today?

A. Someone once told me that I was a firecracker, now I'm a nuclear bomb in Dorney Park. Just --

Q. Just fuck with the timer.

A. -- just fuck with the timer.

Q. Right.

A. No threat to injure anyone.

Q. And this was two days after you're fired, October 19th.

A. It was two days. It was a note to say goodbye to the employees that I cared about, and there was some mention of a lawsuit in there.

Q. And then you posted one maybe five days later referencing the Halloween Haunt, correct?

A. I did, yes.

Q. We're talking about five days after you were fired --

A. Five days after I was terminated.

[43] Q. for posting things on your Facebook account that you were told people were threatened by?

A. I had posted --

Q. Yes or no?

A. -- can I read it?

Q. Was that five days after --

A. Can I read it?

Q. -- you were terminated for a Facebook posting?

A. It was five days, but can I read it?

Q. No, you cannot. And then only three days after you put this post, and at the end you say, "Don't fuck with me," correct?

A. Don't fuck with me, yeah.

Q. Now, while this was all going on, at the same time you get fired and literally it's like maybe two weeks later, you're in court with your wife on the witness stand telling the Court all of these things that she feels threatened by, correct?

A. I had attempted to get custody of the kids and she filed a PFA.

Q. You're in court two weeks later at a PFA hearing where your wife is testifying, correct?

A. Yes.

Q. All right. And after she testifies at the hearing about your Facebook postings and how she feels [44] threatened by them, two or three days later you posted this, correct?

A. I posted that parody of "Whitest Kids U'Know."

Q. You posted this three days after your PFA hearing, yes or no?

A. Yes.

Q. And then 11 days after your PFA hearing, after you know your wife has already been looking at your Facebook account you post this?

A. That's not true.

Q. You were at a PFA hearing where your wife presented Facebook postings from your account she saw she felt were threatening, correct?

A. Correct.

Q. Okay. Now, 11 days after that hearing, 11 days, you posted this post, correct?

A. I would -- I can't see the date.

Q. Okay. Well, let me do it for you this way if that helps.

November 4th, and this was November 15th --

A. Okay.

Q. -- is that fair to say?

A. Okay.

A. I can't see the date, but I'm going to say yes.

Q. So, if I'm doing my math right, that's about 11

[45] A. Okay.

Q. Would you agree with me on that?

A. Okay.

Q. Okay. So less than two weeks later after the PFA hearing where she presents Facebook posts she sees you post this?

A. And she also lied to obtain the PFA,

Q. You posted that after the PFA hearing, right?

A. Yes.

Q. Okay. That's all, that's all you need to answer. And then shortly thereafter you post this threat basically saying, that's it, I've had enough?

A. I would not classify it as a threat.

Q. You made the post, the statement on your post, "That's it, I've had enough." That's how it started, correct?

A. Correct.

Q. And, again, let's go back in time. That was on or about November 16th, correct?

A. Correct.

Q. All right.

A. The same day I posted the --

Q. So prior to that date we now have a termination from Dorney Park, a wife who now has a protection from [46] abuse order and has taken the kids from you, and a posting on your Facebook account where both Dorney Park employees and your wife have seen messages and you saying, "That's it, I've had enough," is that correct?

A. That's correct.

Q. And in that message you basically say you're checking out, you've had it, you've had enough, that's what's in the message, correct?

A. It says that.

Q. And it goes on to say, "Enough elementary schools in a ten-mile radius to initiate the most heinous school shooting ever imagine, and hell hath no fury like a crazy man in a kindergarten class. The only question is, which one." That's what it says, correct?

A. It says that, yes.

Q. And then after that it appears the FBI comes knocking on your door, another event in your life that makes you upset, would that be fair to say?

A. I was upset about the FBI coming, yes.

Q. And that was about November 30th, 2010?

A. I believe so.

Q So in about a five-week period of time you go from losing your job, having no contact with your wife or kids, to have law enforcement knocking on your door, is [47] that fair to say, in about five

weeks?

A. That all happened, yes.

Q. And the very same day that agent sitting right here, Agent Stevens, is at your door, you went on line and you posted another post, and you titled it, "Little Agent Lady," correct?

A. I did, yes.

Q. And that's the post there, right?

A. Yes.

Q. And it goes on, obviously, as everybody can see it, in several different paragraph but it includes, "Pull my knife, flick my wrist, and slit her throat, leaving her bleeding from her jugular in the arms of her partner." That's what it says, right?

A. It says I took all the strength I had not to do that, but that's just violence imagery.

Q. Those words are in there?

A. The words are in there.

(Pause in proceedings.)

Q. All right. And we've already talked about this to a certain degree. Let me take that out of the folder because there's a little bit of a glare.

This is the conversation we talked about previously, right, between Rob and Jill?

A. That's correct.

[48] Q. And would you agree this is a conversation that appears to be solely between Rob and Jill?

A. That is correct.

Q. And somehow this private conversation ended up on your computer?

A. It did.

Q. And, again, you thought you wanted to save it so you took the steps to save it in what, your picture's folder?

A. I wanted to show -- yes, I wanted to show people that were close to me what people were saying about me.

Q. You wanted to show people that you were actually effective at scaring them, weren't you?

A. No.

Q. Yes.

A. No.

Q. You were proud that you got this kind of reaction?

A. No.

Q. Let's look at this a little bit. I mean Jill is basically saying -- let's look at this.

"We are watching a ticking time bomb just waiting for it to go off, and don't know how to disarm it. There has to be some agency that we can alert."

[49] Q. Would you agree when Jill is writing that, she is expressing fear of you?

A. I don't feel it was realistic.

Q. I don't care what you feel. What I'm saying and what I am asking of you is, she writes in her post that she feels threatened, she thinks you're a ticking time bomb. That's what she wrote.

A. She wrote that.

Q. Thank you. And you knew she wrote that?

A. I did know she wrote that.

Q. And it's dated October 20th, correct?

A. It is.

Q. So that was the day -- that was after your second posting regarding -- that we have in court today or over the course of this trial dealing with Dorney Park?

A. Maybe or it may not be. It depends on the timing.

Q. So you don't know if you posted the prior

A. It was the same day.

Q. Okay. All right. So there's one or two before that.

A. Yeah.

Q. So despite you know that people are threatened by what you say, you went on to post more of the same [50] nature --

A. One more.

Q. -- against Dorney Park?

A. Not against Dorney Park, just stating what people are saying, "Moles, didn't I tell you all I had several."

A. Okay.

Q. "You all are saying." I'm not saying that I'm going to do anything. I'm saying that this is what people are saying about me.

Q. That's your interpretation.

MS. STEPHAN: May I just have a moment, Your

Honor?

THE COURT: Sure.

MS. STEPHAN: Thank you.

(Pause in proceedings.)

MS. STEPHAN: Actually, Your Honor, I have nothing else. Thank you.

THE COURT: Can you take the circle off the screen?

MS. STEPHAN: Oh, I'm sorry. Yes, Your Honor.

THE COURT: Thanks. Mr. Cooper, do you have any redirect?

MR. COOPER: Please, Your Honor.

BY MR. COOPER

[51] Q. All right. Mr. Elonis, the government asked you about Government Exhibit 32.

A. Okay.

Q. That referenced the words, "psychological torture." Do you remember the questions on that?

A. Yeah.

Q. You said that was a post to a comment that you had seen, is that right?

A. Yes, I believe so.

Q. So let's go into that - -

A. Yeah.

Q. -- because she didn't question you about that. What are you saying -- you're posting to what is being said?

A. Correct.

Q. What was being said that you responded to that? What do you remember that was being said?

A. The things that were being said about me.

Q. Do you remember anything specific as to what was being said about you then --

A. That I was crazy, that I needed

Q. -- that you responded to in that?

A. -- to be committed. That I needed to be committed, [52] that there was something wrong with me.

Q. Okay. You saw that, you read that, is that right?

A. Uh-huh.

Q. And then you wrote about what you had seen and what you had read --

A. Correct.

Q. -- is that correct?

A. That's correct.

Q. Why did you do that?

A. Because I just -- like I said, when you set the bar really low for yourself, you know, and people are lying about you and spreading rumors, you know, so I made myself a monster.

I already had experience in -- at the Halloween Haunt, so I made an on-line persona and I figured the worse I made myself seem, you know, I didn't care what people said about me.

Q. Now, the emotion that you're displaying right now, is that some of the emotion you displayed at work sometimes?

A. Yeah.

Q. There was a question about harassment, remember?

A. Yeah.

Q. Sexual harassment, is that correct?

A. That's correct.

[53] Q. She wouldn't let you answer about that. What did you want to say?

A. I wanted to say that I didn't see any of the statements, but I knew that that was something that people were saying about me and it was totally untrue.

I don't even remember an incident where I was taking my shirt off in front of Amber. I didn't sexually harass people. I worked there for many years and the issue never came up. So to me it just seemed like I lost my wife, and people saw weakness and they jumped on it.

Q. Because that's the way you felt?

A. Yes.

Q. All right. Now, the government asked you some things, and I'm going to show you Government, I believe it was 13. Okay. These are -- is this a post by Morgan Kennedy?

A. Yeah.

Q. Okay. And then below that are responses to the post?

A. They're responses, yes.

Q. I'm sorry?

A. They are responses, yes.

Q. Okay. So that's Morgan Kennedy and that's Tara Louise and that's you?

[54] A. That's me, yeah.

Q. So you guys are going back and forth talking to each other on Facebook, right?

A. I'm joking around. "See, she's with her boyfriend. It was very upsetting to me, so I said, "Fuck you, mommy," and I put LOL because I was upset, but not -- and what I said to Morgan pass on my status update, there was nothing violent at this time, it was just -- I was looking for someone to go to the movies with.

Q. All right. So this is stuff -- I mean this is the way it went, right?

A. Yeah.

Q. These are the conversations you guys are having?

A. This is the last conversation I ever had with my wife.

Q. You're not talking on the phone, you're not talking in person, you're not talking at a bar, you're talking to each other on the computer?

A. This is the last time I talked to her on Facebook.

Q. And she's responding to you?

A. Yeah.

Q And you're responding to her?

A. Yeah.

Q. And she's talking about insults?

[55] A. Insults, yeah.

Q. Okay.

A. No threats.

Q. You made the comment of "on-line persona," do you remember that?

A. I did, yes.

Q. All right. And when you're talking about "on-line persona," what do you mean by that?

A. It's the character I created for myself. I used a pseudonym. I rhymed about things that have already rhymed about, nothing was new. For people who were saying that there was something wrong with me, and I would cry at work, I would cry, but I'd always have a smile on my face and I did my job.

I just found it very difficult because my family was everything to me. So people felt uncomfortable because I was crying, and then they would say that there was something behind my smile that they felt uncomfortable around me. So that was difficult.

Q. So this on-line persona is you being somebody else?

A. It's me being someone else. Me being, you know, like I said, if -- there's a post that I posted that says, "A man who makes a beast of himself gets rid of the pain of being a man," and that's how I felt.

[56] Q. Now, did you know that Tara Louise was looking at your Facebook account?

A. I had no way of knowing that she -- there's no way to know when someone looks at your Facebook, but there was a PFA hearing where she brought up rhymes, and some of that wasn't even stuff that I wrote. Some of that was the Eminem lyrics that my

defense has presented today. So I was accused of posting rhymes that I didn't even write.

Q. Okay. The November 16th posting, which is about the FBI, I believe, you were asked -- A

A. No, that would be November 30th.

Q I'm sorry. You were asked questions about November 16th posting?

A. Yeah.

Q. Okay. And you were trying to answer that it was the same day. You tried to say something else with regard to that?

A. It was the same day as the "Toxic Avenger." Like I said, it was a subject matter, it's touchy, it's controversial. I'd never harm a child. I've never hurt my children, I have never hurt anyone else's child.

Q. All right.

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APPENDIX O

[Transcript of Jury Trial – Day 3 – October 20, 2011]

[Charging Conference]

* * *

[60] MR. COOPER: As you know before, Your [61] Honor, we discussed previously about what the legal instructions are going to be to the jury.

I'm asking now, and I'll ask later after you give the instruction for exception to that because we have submitted some different instructions, and that was defense number seven, "define a true threat", and asking for the subjective test to be employed.

That is still a position we wanted to maintain for the record that that's the instruction be given --

THE COURT: Right.

MR. COOPER: I know the Court is going to cover in government number 25, the objective test, but I wanted to have an exception to that.

I also said in defense seven, if you look at the language and you could just follow that for a minute.

THE COURT: In defense seven?

MR. COOPER: Defense seven --

THE COURT: Yes.

MR. COOPER: Okay. If we look at the second sentence in the first paragraph of defense seven which says, "The threat is not idle or careless talking, exaggeration, something said in a joking matter or an outburst of transitory anger."

[62] The words, "outburst of transitory anger,"

are not included in the government's definition of threat in government 25, and I ask that "or an outburst of transitory anger," be added to the instruction you're going to give following the government's number 25.

THE COURT: Does the government object to that?

MS. STEPHAN: If I can have one minute --

THE COURT: Sure.

MS. STEPHAN: -- I just want to read something.

(Pause in proceedings.)

MR. COOPER: I will say for the record, I have had that instruction given in similar cases. Not by you, Your Honor. This is the first case of this nature I tried before you, but I did have a specific case which was United States versus Julian (inaudible) before Judge Pratter that this instruction was given.

MS. STEPHAN: I don't have an objection, Your Honor. That's fine.

THE COURT: All right. I don't have any problem with that.

MR. COOPER: Thank you.

THE COURT: With respect to the request that [63] the instruction cover the subjective test, you're asking that I instruct the jury that the government has to prove beyond a reasonable doubt that this defendant specifically intended these threats?

MR. COOPER: Yes, sir.

THE COURT: All right. And that's the law in the Ninth Circuit --

MR. COOPER: Yes.

THE COURT: -- but it's not the law in the Third Circuit?

MR. COOPER: Yes.

THE COURT: The law in the Third Circuit is an objective, reasonable person in the position of the defendant, and in our circuit we focus on the speaker and not on the recipient.

MR. COOPER: Yes.

THE COURT: So I will give that test pursuant to the Kosma decision in the Third Circuit.

[64] The definition of knowingly, number eight, I will cover that. I think wilfully really is covered in the objective reasonable speaker standard, so I'm not going to give wilfully, specifically number nine.

MR. COOPER: Can you grant us an exception as [65] to that?

THE COURT: Sure. Defense number ten, since there are no stipulations, I won't give that. Number 11, I will cover. Number 12, I will cover, that's credibility.

* * *

APPENDIX P

[Transcript of Jury Trial – Day 3 – October 20, 2011]

[Closing Arguments]

[72] [Government's Closing Argument]

[THE COURT:] Ms. Stephan, you may address the jury.

MS. STEPHAN: Thank you, Your Honor. May it please the Court --

THE COURT: Do you want the podium turned toward the jury?

MS. STEPHAN: Oh, no, I'm okay. Thank you, Judge.

In the defendant's own little world he is [73] essentially claiming that he has the right to put people in fear for their lives, for people to take precautions in their every day lives, and for people to sit back and wonder what it is he may do to them and to others. Ladies and gentlemen, that is only the case in his world, in the world that he's living in. That is not reality.

The law, as you will hear it says a person cannot threaten a knife. A person cannot, as you will be defined, express a serious intent to inflict injury on another.

Now, you will hear from the judge in making that assessment that it is not what this defendant subjectively thinks he was accomplishing, although we'll talk about that later. It is what a reasonable objective person making that statement would foresee the results of that statement. And how to do

you get to judge that?

You get to judge that by looking at a couple of factors and the judge will give you these specifically. One, the circumstances and the content of how those statements, and I will call them threats, how those threats were made. You get to look at the whole picture, not just the words alone. There's more context in it.

[74] You get to look at the actual language of the threat. You get to look at how people who read or saw or received that threat reacted. Those are the things that you get to consider in deciding whether or not that man sent communications that expressed serious intent to inflict injury. Those are the factors.

So I want to examine some of those with you in the context of the threats, which you obviously has seen and heard (inaudible) points probably more times than you care.

Now, as you know there are three that you've heard of that pertain to Dorney Park. Let's examine again the factors you get to use in determining whether a serious threat was made. Context and circumstances, what were they?

You heard already, we already know that that's man's life was basically going down the tube by his own hands for sure. He was having problems at home, his wife left him and took the kids. That was in May of 2010.

You heard about him crying at work, and then having problems at work, people reporting conduct about him, having occasions to have incidents with him, that they felt uncomfortable, that he was generally having problems at work that led to what

he called was a [75] forced demotion when he was under direct examination.

So he went from being a supervisor of the park, walking around supervising younger employees, to taking a leave of absence, to coming back in a position where it was a forced, in his words, demotion.

Then several months later when he still couldn't pull his act together, and was causing other problems including what you saw on the Facebook page, a picture of Amber next to the defendant in what was once an innocent photograph at the prior Halloween Haunt, now the caption saying, "I wish."

You already know Amber had told you about the problems she had with him, and the repeated times that she went to management to complain. Now, on October 17th of 2010, defendant is posting on his Facebook account, this picture of her with a knife to her throat that at one time was an innocent photograph with the caption, "I wish." Context, ladies and gentlemen, context. That day, the final straw, he's fired.

In his communication, communication summary or counseling summary, whatever they call it, you saw the summary on your screens. It basically was communicating to him this threatening communication was reported, your termination -- your disciplinary action is escalated to termination, that's it. End of story, [76] you're gone from Dorney Park. Once again, at his own hands by his own actions.

So now we come to October 19th, the date of the first post that's charged in the indictment against

the defendant. That's the post where he spills out all this stuff about his love for the park, and the industry and, you know, on and on and on, tells you on direct that, oh, you know, that's what I meant, that's what I'm serious about.

And then he ended that with "Someone told me I was a firecracker. I'm a nuclear bomb and Dorney Park just tucked with the timer and basically I'd be talking about a damage-control plan." Two days after he's fired. Again, in context with everything that's happened at his life up to this point in time.

But as you know only a few days after that comes the next post to Dorney Park where he basically is talking about the airplanes crashing, and somebody like on a -- it seems to be like almost reporting what's happening as it's happening at the park. It's basically a sort of a summary of almost mayhem happening at the park, and he ends with the term,

"Don't fuck with me."

Then as you know about five days after he's fired comes the third post that's charged in the [77] indictment, the third threatening communication where he's specifically talking about the Halloween Haunt.

Now, again, ladies and gentlemen, you all heard about the Halloween Haunt and what actually happens at Dorney Park during that time period.

Context and circumstances you can consider once again.

The Dorney Park Halloween Haunt is a dark amusement park with fog being blown, with the lights dimmed, with the employees dressed in

costume, and he's making these threatening post about, "Whoever thought the Halloween Haunt could be so fucking scary," Basically suggesting he has keys to the park, and he has sinister plans for all of his friends.

Again, ladies and gentlemen, you heard from Dan Hall, from Amber, from himself that he was always emotional and then that seemed to vacuolate to getting angry and then emotional, and the emotions seemed to feed the anger which resulted in all of these things you saw happened, the post about Amber, the repost we just talked about, circumstances in context, ladies and gentlemen.

The second factor as it applies to these post, the language used. Now, I just went over some of the language so I'm not going to bore you with all the details again. You'll have the opportunity to see them [78] again if you want to, but you've certainly seen them a lot of times now during the trial. Look at the language that is used, what is he saying?

Now, one thing you'll have to remember, and listen to the judge's instruction carefully, the government does not have to -- you will hear no instruction telling you you have to prove he had the ability to carry out the threat. That is not our burden, and the judge will instruct you accordingly.

The charged conduct here, what he did was send this threatening communication that was cause essentially to terrorize another, put somebody else in fear, afraid of bodily injury.

We do not have to prove he intended or had the ability to carry out exactly word-for-word what's in his post, just that he intended or not even he, a

reasonable speaker, a reasonable threatener could foresee that the language will cause someone to be placed in fear. So when you're looking at that language, I suggest that you look at it in that context. Okay.

And the third factor you can consider when assessing whether or not these are serious threats to injure the person of another is how people receive [79] them, how did they perceive them. That is something you can all take into consideration.

You heard from almost all of the witnesses except for the computer guys, that they read the respective posts that they saw and how they felt. You heard from the chief of park patrol, Daniel Hall. He told you that he personally felt threatened for the safety of him, the park and the staff.

Now, it's his job to protect that park. He had to take steps when he saw these to make sure that he could do what he could do under his capacity to keep the park safe. That is something you can take into consideration.

If he did not feel these were serious, if he did not feel threatened for himself or for others, then why would he take any precautions at all? Oh, it's just rap lyrics, it's just fictitious stories, I'm not going to -- no, oh, that's just Anthony Elonis.

No, that's not what he did. The evidence in this case is he took it seriously, so seriously that he had meetings with his park patrol, he called law enforcement.

He didn't stop at local law enforcement, you heard he called South Whitehall Police Department. He went all the way to the FBI because he took them

[80] seriously. That is absolutely a factor you can consider.

Who else? Amber. Amber will tell you how she reacted. I mean I think you can all perceive her demeanor on the stand. You have the right to assess people's credibility and what they say based upon what you see as well.

I would submit the way I perceived her she looked nervous. She almost appeared to be hiding behind the computer screen there, and sort of, I think, almost looking over in your direction only. She seemed to be very afraid and nervous. But that's up to you to decide how you perceived her testimony and the way that she gave it.

But she told you specifically, she did absolutely -- she was in fear for her life. She didn't go to school for two weeks. She picked out a hiding place in Dorney Park in the event he came there and she needed to protect herself. That is how afraid she was.

She didn't think they were rap lyrics, she didn't think they were fictitious stories. She went so far to alter her life by not going to school and by finding hiding places, ladies and gentlemen.

You can consider that in deciding whether or not a reasonable person who makes those threats would [81] perceive it or perceive that someone would feel threatened by them.

Okay. Let's move on to the other ones.

Let's apply the same standards to the other posts or the other threats. The next one comes up to his wife, Tara Elonis.

Now, obviously they have a history together, and

I think you got to see a bigger context of that when you saw some of the posts that predated what was going on, the charged conduct in this case, and you got to see those posts, those things that he was saying about his wife.

The post where he's -- he comes into court and says, "I love her," and "I don't want to be divorced," and "I want to stay with her," and "I still love her," and talks about my wife. Now, she very clearly says, you know, sure, ex-wife at first, but then modified it to be that she has filed for divorce.

But this is the person he's proclaiming to you that he loves and cares for and still wants to be married to. You saw the posts. I mean, seriously, he threatens violence at her.

He uses specific terms that she knows would directly apply to her. For instance, Toad Creek, Toad Creek, specific creek. He admitted that was near the [82] place she was living.

Is that fictitious rap lyrics, ladies and gentlemen? It's tailored threats, I submit to you, that's what it is. It's not fiction, it's not rap lyrics.

He wants to put all this fluff language around it, but the real issue here is in context with what was going on in his life, he wanted to make these people upset, he wanted to put them in fear, and that is exactly what we're talking about with Tara.

He was mad at her, you know that. He didn't want her to leave him. But I submit to you, based upon the evidence, his actions is the cause of it. What choice did she have under those circumstances?

Okay. So now we know, she has all these threatening posts she talks about. She files for protection from abuse. It's served on the defendant and he has to appear in court, and he does, in fact, appear in court and there is a hearing.

She says that the hearing is at least three hours in length where she testified specifically she saw certain posts on Facebook, and here's what the posts say, and you got to see some of those. I feel threatened by him, he admitted that and she was granted her protection from abuse order. [83] And, you know, three days later, three, now, let's talk about context, three days later he posts this thing which he claims is a parody or something from "The Whitest kids," whatever. You saw that comedy skit.

So he uses that, but he changes it. And as a side note, he's claiming to be some fictitious writer, rap lyricist, but he's not, you know, he's just copying and pasting other people's stuff and turning it into his own specific threats to use against others.

It seems a little bit contrary to his arguments, but nonetheless he has this post in which he takes that language and uses it against his wife. He puts her name in there, he puts a diagram specifically how the house she's living in with her father is laid out. The house with the sun room and the cornfield and what he calls the get-away road, she calls a less traveled road. He puts that in the post as well.

Again, this is three days after the PFA where she's telling the Court in front of the defendant, I am afraid of this man. I am afraid of this man. Would a reasonably objective person posting this communication foresee somebody would feel

threatened by it?

That is the question you need to ask. Under the context and circumstances of this case, I submit to [84] you, that answer is yes. He already knew she saw his Facebook account. He knew she looked there repeatedly. He posted in the public space on his Facebook account knowing she was going to see it.

That is where she saw all the other ones. That is a reasonable conclusion to draw from the facts in this case.

Using her name, specific facts about the house that she's living in after she says she's afraid of this man. Would an objectively reasonable person foresee that someone would be threatened by that message and, again, I submit the answer is yes.

The, ladies and gentlemen, we have 11 days, I think is what the defendant agreed with me after, November 15th, we have a "Fold your PFA and put it in your pocket. Is it thick enough to stop a bullet," and you know where it goes from there.

Eleven days after she's in court once again saying I'm in fear of that man, he posts this on Facebook in a place he knows she's already going to check. He makes it public and wants you to believe it's some kind of fictitious statement.

I submit to you, really, seriously, under the facts of this case, is that something that you can really digest and be okay with? Not under the [85] circumstances of this case, not with the language used. He talks about language again, PFA, I mean that's specific to her. It's specific to what just happened in their lives, ladies and gentlemen.

Okay. Then we get on this particularly two postings that pertains to Tara to whether or not -- a third factor you guys can consider, is whether or not the person who received that message, how they felt by it, were they threatened by it. What do you think? You saw Tara testify.

You can reach your conclusions, but she certainly said she was afraid. We certainly know she already got a protection from abuse order from the judge, and you saw what was going on in their lives and the previous statements he was making or threats on Facebook, and you saw what was in these two posts. You can consider that she absolutely is afraid of him and contact by him.

And then I would suggest after you do this analysis I've just laid out, that you find that those posts are serious expressions to inflict injury on another, and a reasonably objective person who posts something like that would know, would foresee that that would be intimidating or threatening to them.

Now, the PFA threat also talks about the [86] state police and the sheriff's department. There is another count in the indictment that pertains to them. I'll actually put this up for you so that it's clear.

You see on the bottom it says, "And if worse comes to worse, I've got enough explosives to take care of the state police and the sheriff's department." Count three, I believe, in the indictment is a count pertaining to that.

Once again, in that same post he manages to threaten Tara basically saying, "Take your PFA and put it in your pocket. Is it thick enough to stop a

bullet," and then also basically threatens the law enforcement officers that had any part in what was happening in their lives. That's a separate consideration for you.

Now, again, the test in this case is whether a reasonable person who posts that message would perceive that the person who received it would foresee they would think it was a threat.

I don't need those law enforcement officers here. I had people like Tara and other witnesses tell you that when they read that, they perceived it as a threat, and that is all you need to do the same analysis I've gone through in this case as it applies to that message as well for the state police and the [87] sheriff's department.

Okay. Let's move on then. We then come to the elementary school case. Now, let's talk about that one. "Initiate the most heinous school shooting ever imagined," and he references kindergarten classes in a ten-mile radius from his home.

Now, ladies and gentlemen, let's look at the context, and I think I tried to highlight that for you when I was cross-examining the defendant. We started off by, before we get to this particular threat, okay, he's now lost his family, lost his job, can't see his kids, can't talk to his wife, mad at everybody.

Posting all of this on Facebook, that predates it. Then he posts this. Now, let's also take into consideration, we're talking about context and circumstances of this post that we know on October 20th, he saved on his computer what appeared to be a private conversation between this Rob Hill and Jill Matlock, I think is her last name.

They're expressing in there that they think he's a ticking time bomb, they are concerned. This is only a couple of days after he was fired, they're already expressing that, and all of these things continued to happen and he posts that.

What would a reasonable objective person who [88] post that kind of threat foresee its impact on somebody else? He knows everybody thinks he's basically just gone off. He's just lost it now. He's mad, he's angry, he's upset, his life is in shambles and he posts that message.

I submit to you they're going to think, oh, my God, I mean he's really gone way too far now. I mean he's threatening elementary school kids and he's going to basically check out himself. It seems like if you read the message, take out elementary school kids in the process so he could make a name for himself, something we'll talk about in a few minutes.

I submit to you, absolutely people have to and should have and did take that threat seriously. The FBI made sure they called the local police departments and they contacted the people in charge of the schools to make sure those messages got out there.

That is something you consider. What did people do, what precautions did they take? Did they perceive it as threatening, absolutely. Under these facts in this case, even alone, even by itself, even out of context, I submit to you, you should know that that is a message that is going to be taken seriously I'm going to perceive as a threat.

But when you add that message to the context [89] of this case, ladies and gentlemen, absolutely.

There's no doubt about it from the facts in this record, I submit to you, the evidence in this case shows that would be foreseen to be a serious threat.

Then, ladies and gentlemen, we get to the point where FBI goes to talk to him. As you know, at this point in time an investigation has already been going on, I mean for quite some time at this point, for weeks, looking into everything that's going on in his life, and everything about him.

Now, they get to the point where they go into his house and we're going to talk to him and then take action from there, and what happens? His reaction that day is, basically take his time coming out to the porch, and then basically, I don't have to talk to you, so I'm going inside.

And what do we know? We know that that same day he posts "The little agent lady" threat. It's explicit. I would submit to you, it's alarming like all the others. He talks about taking all my strength not to turn the bitch, goes, "Pull my knife, flick my wrist and slit her throat leaving her bleeding from her jugular in the arms of her partner."

Again, ladies and gentlemen, he knows all of these things have happened at this point in time in his [90] life. He knows people are watching his Facebook pages, he knows that. He knows and has been begging, you saw my cross-examination, begging the law enforcement, "Come arrest me. Yeah, I'm basically going to rake in the money on this." He knows he's being watched on his Facebook account.

He even says in one of them, I think, well, he thinks he's under investigation for terrorism is what

I think he posted on them. He knows people are seeing those Facebook account pages and he knows she's at the door and he knows why.

The evidence in this case is he knows exactly why she's standing on his doorstep that day, and what does he do? He posts this message in the exact space he knows she's going to see it. The exact space he knows.

The forums he's using, ladies and gentlemen, is quick. He could get these threats out, crank them out and within seconds of pressing that send button he's reaching his intended targets, within seconds and that included Agent Stevens.

In context, taken everything into consideration here, the context, the language I just read to you in this post, and the reaction of the recipient. [91] Agent Stevens testified that actually she was in fear, and she kept a lookout on her block when she got home. She told her husband about it so he could be on alert. She reacted to that because she took it seriously.

I think basically just to follow that, saying he's charged, he's charged before you today, charged with five counts of making these threats, that you can take that into consideration in determining whether or not she took this seriously or not, that is why we are here.

Now, you're going to be given elements of the offense, and I basically already covered the first one, you know, you have to find that he sent a communication communicating a threat to injure the person of another, and the judge will give you the more eloquent terminology.

There are two other elements that he's going to talk to you about. One is, that the communication is sent in interstate commerce. And essentially the judge is going to give you some instruction that basically says, if you find he used the internet to make those communications, that the internet is the source of that interstate commerce and that would satisfied the element -- all of the charges against [92] him.

And the third element you are going to hear is that he knowingly, intentionally made the communication. Now, listen clearly when he gives you this instruction because knowingly and intentionally applies to making the communication, typing the words on his screen, pressing that enter button to get it onto Facebook, that's what it pertains to, making that communication itself.

The other analysis comes into whether or not a reasonable objective person would foresee that particular message as a threat, not what he intended it to be. The knowing and intentionally only applies to him making the actual communication.

The other analysis I've been discussing for quite some time now is what the first element is, and the other factors you can consider. So listen to the judge carefully when he gives you those instructions because, again, we do not have to prove he intended to carry out anything. We do not.

We have to prove to you that an objective person making the threat would perceive the recipients would be threatened. I submit to you today, we have proven that.

I'm going to talk about a few other things [93]

before I finish with you, at least for this point, credibility. He testified, so now you're allowed to consider his credibility in making your judgment.

I would submit to you that even if yo were to believe absolutely everything that he said to you today, it has absolutely not impact on whether or not you should find him guilty or not.

Because what he's talking about is, these are things from rap lyrics, these are fictitious stories, I like the really violent stuff, it was my way to cope, it made me feel better. Those are the things that he's talking about. Again, it doesn't matter what he thinks. He puts that post on the internet.

I keep saying this because it is the issue in this case, it's what an objectively reasonable person would think that message would do to the recipient, not whether or not he believes, if he puts a disclaimer, or he says it's fictitious, or he says, I have protected speech, none of that matters if you find in context that a person would be in fear of that.

So those are the things that he's saying and the way that he's saying it, I would submit to you, are irrelevant. He cannot get up here before you and say, "I put that it was consciously protected speech. I put that it was fictitious lyrics, therefore, I am not [94] guilty." He cannot say that.

You also saw all the posts that he's basically almost instigating law enforcement to arrest him. One, you saw he basically was responding to South Whitehall Township Police Department and basically saying, you know, "Go ahead and arrest me, but I have my sights set at the federal level."

He's begging to be arrested. Do you think he's

begging to be arrested because he's not intending anybody harm? Do you think he's pushing it as far as he can in his own little world, knowing what he's doing for some other motives? Again, motive is something you can examine as well.

He talks about, you know, suing the government and getting a lot of money in all those ramblings you heard about, and those are things you could take into consideration in this case as well.

Now, when you come down to it we have, basically a man who comes before the Court and says, poor me, I lost my wife, I'm so distraught. I lost my job. It was an industry I dedicated my life to. Law enforcement, how dare they come to my home and want to question me. Poor me. I should be allowed to vent on the internet on Facebook.

I should be allowed to make myself feel [95] better by saying horribly violent things because that's therapeutic to me. I should be allowed to do that, again, because I have caveat because it's rap lyrics and fictitious lyrics. That is what he wants you to believe, ladies and gentlemen.

And when you get the elements read to you and you apply them to the facts in this case you will find that poor Anthony Elonis' life, in the context in which he did this, he made these threatening communications.

Okay. We don't have to prove he intended them to be threatening, but I would submit to you, despite the fact we don't have to prove it, that is evident in this case, that he intended it, he was mad at the world, mad at his wife, mad at law enforcement, mad at Dorney Park, he was mad, and he was lashing out

to hurt them, and he was hurting them effectively because they all told you how much in fear they were by what he was doing.

Okay. Ladies and gentlemen, in this case, once again, people's lives were placedpeople were placed in fear, people's lives were disrupted and people worried about what he was going to do to them.

His threats were serious expressions to inflict bodily injury, and despite his ranting to the contrary, these people felt threatened and felt harmed, [96] and I ask that you find him guilty of all counts. Thank you.

THE COURT: Thank you, Ms. Stephan. Mr. Cooper, you may address the jury.

MR. COOPER: Thank you, Your Honor.

May it please the Court, ladies and gentlemen, good morning. Ms. Stephan talked to you about the elements of this charge in this indictment. She talked to you about instructions you would get from the Court of how to analyze this case and what the elements are, what the definition of a threat, and I want to read something to you because you're going to hear this from the Court later.

"A threat is a serious expression, statement, expressing an intent to inflict injury at once or in the future as distinguishable from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger."

You're going to hear that from the Court later when he instructs you on the law that applies in this case. What did you hear in this case, what do we know as a result of this case? What we know, what

we know is that Mr. Elonis had no family, that his family disappeared, that Tara Elonis left, took the children with her, he loved those kids, he was unhappy, he was [97] sad, he was depressed, it was displayed, it was displayed here, it was displayed at work, he was suffering, and it was building and it was there.

Then, and then he lost the job, and he lost the job, he was terminated from the job and he's in dispute over the termination of the job. But he wrote and he thanked the people that he had worked with. He explained how much he loved it there. He didn't have it anymore. So he didn't have that, he didn't have the kids, he didn't have a house, he didn't have a place, and he was pretty upset.

Now, look, things happen in life, you know, we all come under stress, we know that, we know that. But I'm asking you to look at this person who is charged with these offenses because his fate is in your hands now. You're the collective group. You have to sit in judgment.

You have to decide whether this guy is a criminal or not by what he did, posting on a computer, posting on a computer. He's not writing letters directly to somebody, he's not leaving phone messages, he's not trying to -- he's saying to the world, this is how I feel, this is how I feel, I'm angry, I'm angry, I'm angry, I'm responding to comments. People are commenting about what I'm saying, they're talking about [98] me, I'm hitting back, and I'm on the computer doing it. I'm on the computer doing it.

I'm not going out to the street. I'm not interrupting their business or their job. I'm on the

computer and they're firing back. Tara Elonis is firing back. There you go with the insults again, and there's a lot of swearing back and forth.

This is the age we live in, I mean, this is what some people do, they communicate on this Facebook, they yell at each other on the Facebook, they swear at each other on the Facebook. This is what's going on, and this is what he did in that world that he lives in. I ask you to consider that.

A threat is not idle, careless, exaggeration, outburst of transitory anger, that is not what it is. And what's he getting out of this? He gets to get locked up, that's what he wants?

He said, I'm trying to help myself. It may not be the way you do it. You may not like what he wrote, it's crude offensive stuff. Okay. Okay. Fine. That's not why we're here. We're here to decide if he's a criminal for doing that.

Now, you can't just put it in a vacuum and say, well, I've got Count Number 1, Count Number 2, Count Number 3, here's what he posted, here's what he [99] said, end of story. It doesn't work like that. It is context, it is circumstances, it is what was going on in his life, it is who the people are, it's all of those things.

Before you decide that somebody is going to be a criminal you have to consider, well, what are we really talking about here. The FBI came to his house, came outside in a couple of minutes, was wearing shirt and pants. He said, "Do I have to stay here?" They said, "No." He said, "All right. Thanks." Goes back inside. That's it.

Then he writes in the postings, you know, "I was

strapped," I was this, I was that. I mean can't you look at it in another way? Can you say, come on, are you serious, you were out there in, you know, shirt and pants, you came out in a couple of minutes.

I mean can't it be looked at in that way reasonably, that it's not being said as a threat, that it's just this guy blowing off? Because at the end he says, "And if you believe this crap," you know, "I've got a bridge to sell you," like, you know, I'm just talking.

Can't it be interpreted that way reasonably? Isn't that so? And if you can interpret it that way reasonably, as much as the government wants you to [100] interpret it, that's not proof beyond a reasonable doubt. That's not proof beyond a reasonable doubt.

That's, well, okay, that's one way of looking at it, according to the government. That's one way of looking at it according to the defense. Does that make him a criminal? Okay.

You don't have to agree with him, what he said. You don't have to like what he said. We're not asking you to do that. We're asking you to say, well, am I going to make him a criminal because of that.

We all know, I think, that this idea of this Facebook is pretty open, it's social networking, you get to say what's on your mind, people comment on it, people can shut you down, you know, they don't have to read it, they don't have to read it. If they look for it, they can find it, but they don't have to read it. It's not like you turn your computer on and there's the message. You've got to search for the message.

We also know that you can say in a Facebook, look, you know, we don't know what this guy is doing, shut him down, you know, but that never happened. That never happened.

What else do we know? We know that there were no other communications involved here. It's only the Facebook that's being talked about. That's the [101] only medium of these communications.

As we've said, this is so open, this is so much a part of the culture. You have these rap lyrics, and you have these people posting all this different kind of stuff on the internet and on the Facebook.

I mean it just goes back and forth and back and forth. It's part of the culture that some people go to, not everybody, you know. If you don't like that, you don't have to go to that, but some people do. I mean it's just the way they are. But there's another way of looking at it.

Another way of looking at it is reasonably, that this guy is being this person, he said, "I was being somebody else." They know him. The people at Dorney Park know him. Tara Elonis knows him. Amber Morrisey knows him. They know who the person is. They know he's an actor.

They know he gets involved in that. They know, or, he said he was involved in a theater program. I mean this guy, this guy decided that he was going - ¬he had this angry and this upsetness and this is the way he handled it. That's what he decided.

And if you don't agree, that's not the way you would have handled it, okay. But that's the way he handled it. And the instructions says, if it's [102] careless, if it's exaggerated, if it's an outburst, if it's

transitory anger, it's not a true threat because he's just speaking, he's just talking, and if you're just talking, you're not a criminal. That's what the law says.

Now, in this case the judge is going to instruct you on what is proof beyond a reasonable doubt, what does that mean, what's the concept.

A reasonable doubt is the kind of a doubt that a normal ordinary and prudent person would have in order to pause or hesitate or refrain from acting in a matter of extreme importance. That's the definition of reasonable doubt. What does that really mean? What does that really mean?

What that means is this, this is not about deciding what you're going to do this weekend, or what kind of house you're gding to buy or any of that stuff. This is a forever decision, right. It's a forever decision.

After you decide this case, the chances of all of us seeing each other again is pretty small. Okay. You can't go home tomorrow or whenever day you decide this case, you can't go home the next day and say, gee, now that I think about it, you know, I have reasonable doubt. You've got to be very very sure. [103] So what's an example? What's a concrete example in your life that you would use to say, well, how would I judge this case and what standard do I use to judge this case because it's a criminal case and the burden is on the government.

Their burden is high, and their burden is to prove beyond a reasonable doubt before this decision has to be made and his presumption of innocence taken away, and you're calling him a criminal, how do you

look at that in a concrete way?

Let me give you an example. This is not the only example. You can't certainly think of other examples. You go to the doctor. The doctor says you've got a medical condition, we've got to take something out. Okay. Pretty serious operation.

Now, what could happen is, you may die during this operation, you may not survive it because of the complications that are involved. So before you consent to the operation, you've got to think about it, okay.

You think about it, you talk with other people about it and you say, maybe or it sounds good, or pretty good, or very good. The guy knows his stuff but, you know, I really need a second opinion. really want to talk [*sic*] to another doctor. I want to talk to another professional.

[104] I want to get some more -- I need more information. I need more to decide, because once you do that, I mean, that's it, right? I mean you can't change your mind later. I mean that's a forever, that's a forever type of thing. So that's the standard, I submit, that you have to have to decide this case, and in this case they don't have that.

You know, there's another way of looking at it other than what the government says which are the ways that I've suggested to you as to this guy talking and what he was saying.

It could reasonably be interpreted that he is being careless, that he is exaggerating, that the people know -- some of the people know who he is and they're engaging him back and forth on the computer, and that he is upset, and that he is angry,

and that it is transitory, and it's being transported into these communications.

You saw him and you'll judge. This is not a guy who is going to take out a school, take out an amusement park and all that stuff, okay. What he said you didn't like, you can use some of that, okay, that's fine.

But, you know, we're not here for that.

We're not here because we agree or disagree with what [105] he likes or doesn't like. We're here to decide whether by doing what he did he is a criminal, and I submit to you that the evidence in this case does not sufficiently show that.

Now, this is my last chance to talk with you about the case. The government may respond to what I say and talk a little bit more, and then the judge is going to talk to you and they you're going to have the case for yourself. Okay.

I hope that you consider what I said and that you determine that, you know, the proper thing in this case is a verdict of not guilty as to call somebody, to call Mr. Elonis a criminal would be the wrong thing to do here. Thank you.

THE COURT: Thank you, Mr. Cooper. Ms. Stephan, do you have any rebuttal?

MS. STEPHAN: I do, Your Honor, and I will be brief.

Okay. He talks about this outburst of transitory anger, not a joke, not idle or careless talk. He says that to you in a way of saying that a serious expression of intent to inflict injury on another is not these things, it's not careless talk, it's not idle talk,

it's not an outburst of transitory anger. [106] I submit to you, ladies and gentlemen, based upon the evidence in this case, do you see anything in his writings that it's just a simple careless commentary that he overlooked in writing it and, oh, my goodness it was interpreted as a threat? No.

Is what he's saying, idle or is it a joke? It's certainly not said in a joking manner. He may put LOL at the end of certain expressions, but it's certainly not sent, I suggest, in a joking manner.

And he talks about this outburst of transitory anger. I submit to you an outburst of transitory anger, and you can make your own determination, maybe like somebody, you know, experiencing road rage. Someone cuts him off on the highway and someone yells, "I'm going to f-ing kill you."

I mean I would think of that terminology, but you have to make your own determinations, that's what kind of an outburst of transitory anger is, not the plotting that went on here, not at all in this case.

He also made mention now that there was a lot of swearing back and forth. You have to look at the evidence for yourself. From what I recollect, the only swearing that was coming was from him.

He also talks about, you know, strapped with [107] a bomb, do you believe he would have been strapped and he says at the end, this is not a guy who is going to go out and actually shoot up a school.

Once again, you may or may not believe what he said. You may not believe it. You may believe he is, you may believe he isn't, it's irrelevant, it's irrelevant. It doesn't matter if he had the ability to carry it out or the intention to carry out.

What matters is, did he place people in fear. And not even specifically in fear of an explosion, or specifically in fear of exactly a plane crashing into Dorney Park. Did his communications put people in fear?

We don't have to prove he intended to carry out (inaudible) again. You may conclude one way or the other. You can reach your own conclusions, but it's irrelevant to this case, for these elements, for the law that you'll be given.

And, lastly, Your Honor, and I will let you get to lunch -- I'm sorry, Your Honor, Jury, sorry, the medium that he chose was Facebook. His attorney wants to point out to you that you should give this less weight because it's Facebook. My gosh, it's just Facebook. It's a social networking site, people always do these things on Facebook. You don't have any [108] evidence of that.

Now, you may have your own personal experiences with Facebook, but what you've heard in this case was really through one or two of the computer guys. They state people share photos, family photos, what they're doing today, what their plans are, sporting things, whatever they testified to. But it's not a general statement to say people use Facebook this way, that's an acceptable statement. You have no evidence of that, nor does it matter.

I submit to you that Facebook is a good method for him in this case to have communicated these threats, and you heard way. Everybody he targeted, Dorney Park, his wife, law enforcement, he knew they were looking at his Facebook account. He knew they would find his threats there.

If you take that in relationship to his statements that this was therapeutic, I suggest the one way you could look at it is to say, okay, he's upset, he's angry, he wants to lash out. The quickest thing at his disposal is typing a message, hitting that send button and poof, the people he is really angry with are getting these threats.

I would suggest in this case Facebook was an amazing tool for him to use to communicate his threats, [109] quick, fast and he knew they were going to get it, he knew they were going to look there.

If it was so therapeutic to him and personal to him and a way to deal with life situations, why not keep it private? Post away in your own personal word processing document at home that you are having such a terrible crisis in your life, and I'm going to rap out terrible lyrics and even direct them at my wife, but keep them in your personal computer and don't share them.

That's not what he did in this case, ladies and gentlemen, he chose to share them on a medium which he knew was going to reach his targets and reach them quickly. Again, I ask you to find him guilty. Thank you.

APPENDIX Q

[Transcript of Jury Trial – Day 3 – October 20, 2011]

[JURY CHARGE]

* * *

[110] CHARGE OF THE COURT

THE COURT: Now that you have heard all the evidence and the arguments of the attorneys, it becomes my duty to instruct you on the law as it applies to this case.

* * *

[124] The defendant has pleaded not guilty to the charges contained in the indictment. This plea of not guilty puts in issue the essential elements of the offenses as described in these instructions and imposes on the government the burden of establishing those elements beyond a reasonable doubt.

* * *

[125] I want to talk at this time about the elements of the crime, that is, what the government must prove for these charges.

The indictment charges Anthony Douglas Elonis with transmitting a threat by interstate communication. Title 18 of the United States Code, Section 875(c) makes it a federal crime to knowingly and willfully transmit in interstate or foreign commerce a true threat to kidnap or injure any person.

In order to find the defendant guilty of any of these offenses, you must find that the government

proved each of the following elements beyond a reasonable doubt.

First, that Anthony Douglas Elonis sent or transmitted in interstate or foreign commerce a communication containing a true threat to injure the person of another.

Second, that he transmitted a threat knowingly and intentionally.

I want to go over some of the terms that are used in those elements. First of all, transmission in interstate commerce. The government must prove beyond [126] a reasonable doubt that a threat was transmitted in interstate or foreign commerce.

To transmit something in interstate commerce means to send it from a place in one state to a place in another state. To transmit something in foreign commerce means to send it from a place in the United States to any place outside the United States.

If the government proves beyond a reasonable doubt that the communication passed between two or more states, it is sufficient to establish this element even if a defendant and the victim were in the same state at the time.

The government is not required to prove that the defendant knew the threat would be transmitted across state lines. Because of the interstate nature of the internet, if you find beyond a reasonable doubt that the defendant used the internet in communicating a threat, then that communication traveled in interstate commerce.

The government must establish beyond a reasonable doubt that the words communicated by

the defendant were a true threat, as I will define that term for you.

To constitute a true threat, the statement must communicate a serious expression of an intent to [127] commit an act of unlawful violence to a particular individual or group of individuals. This is distinguished from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger.

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

It is not necessary that the government prove that the defendant intended to carry out the threat or that he had the present ability to carry out the threat.

So, again, the test is called the "objective speaker test." I'll read the definition again. A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual. [128] So would a reasonable person in the position of the defendant, have foreseen that the communication that he made would be interpreted by the recipient as a serious

expression of an intention to inflict bodily injury or take the life of an individual.

To determine whether or not the defendant made a true threat you should consider the circumstances under which the statement was made. You should consider the context within which the statement was made.

You should consider the effect on the listener or reader of the statement. Consider whether the statements were conditional, or whether they specified the precise date, time or place for carrying out an alleged threat. So all of those are circumstances or context that you should consider in evaluating whether these statements were true threats.

The second element that the government must prove is that Anthony Douglas Elonis transmitted the threat knowingly and intentionally. A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident or carelessness.

The government is not required to prove that the defendant intended to carry out the threat. The [129] intent requirement refers to the intent to make the communication in the first place.

The government must prove beyond a reasonable doubt that the defendant intended to make the communication. The government is not required to prove that the defendant himself intended for the statement to be a true threat.

Whether the statement or communication on the Facebook posting constitutes a true threat is determined by the objective standard I described for

you earlier.

* * *

[131] THE COURT: Do you have any objections or modifications to the charge.

MS. STEPHAN: No, Your Honor.

THE COURT: Mr. Cooper?

[132] MR. COOPER: Yes. For the record, Your Honor, I'm going to object to the Court's instruction of using the objective person standard in defining true threats.

As you know, we've submitted an instruction asking for the subjective intent of the defendant as being the standard that the government would be required to prove. The Court has given a different an instruction than that, and I'm placing my objection on the record as to that at this time.

In addition to that, Your Honor, in the discussion we had this morning, I asked for the term "willfully" to be defined to the jury. And the Court declined to do that, and the Court has not given that instruction to the jury, and I'm asking for the Court to give that instruction.

The indictment does say, I believe, that he willfully committed these crimes. If the indictment says that, the instruction on "willfully" should be given is my view.

THE COURT: What's your position?

MS. STEPHAN: Does the indictment say "willfully," Your Honor?

MR. COOPER: It does. If you look at the indictment --

[133] THE COURT: Yes, let me see.

MR. COOPER: It's up there.

THE COURT: It says, "knowingly and willfully." (Inaudible) because that was basically covered in the discussion of the objective test, that they have to prove that he intentionally made the statements, but then whether it was intended to be a true threat is an objective standard, and I think to give them the willful instruction confuses that issue.

MS. STEPHAN: Thank you, Your Honor.

MR. COOPER: I'm asking that you give the willful instruction. I mean, (inaudible) means that it's going to the jury.

THE COURT: I can certainly tell them that they can consider whether he intentionally or willfully made the statement. Would you be satisfied with that? Or do you want the subjective test for the whole --

MR. COOPER: Well, I want the subjective test, but the term "willfully" is a legal term, it is defined. I mean if you say, "willing and willfully" without defining what willfully means, that would be the -- that's what is alleged.

THE COURT: Let me look at your instruction. MR. COOPER: Sure. It's number nine. (Pause in proceedings.)

[134] THE COURT: To find he acted willfully you must find that he acted with a purpose to disobey or disregard the law. Willfully does not require proof that he had any evil motive or bad purpose other than the purpose to disobey or disregard the law.

MS. STEPHAN: I think that's just a wrong

statement, Your Honor, under the law.

THE COURT: I think it's confusing because we have this objective standard. I think the instruction is that you have to find that he intentionally -- I think the term "intentionally" subsumes willfully.

MS. STEPHAN: I agree, Your Honor.

MR. COOPER: I understand that you say that it might, but my position is that it doesn't

THE COURT: Well, I'll mention the word "willfully" since its on the indictment, and then tell them that it's basically synonymous with intentional, that he has to know what he's doing and have a purpose to disregard the law.

MR. COOPER: That's fine.

MS. STEPHAN: And as it pertains to his intent to post a communication, the objective standard still applies as you gave to them?

THE COURT: Yes.

MS. STEPHAN: Okay.

[135] THE COURT: They don't have to prove -- see, I'm concerned that willfully confuses them if you have to find that he willfully meant to communicate a true threat.

MS. STEPHAN: Exactly.

THE COURT: And they don't have to prove that. The government does not have to prove that.

MS. STEPHAN: No. And even if the way the indictment is written, I think it's the same interpretation as the third element in this case, it's the knowingly and intentionally sending the communication.

MR. COOPER: Well, if you're going to give the term as you described in willfully, I'm sorry.

THE COURT: See, I think if I instruct them that they have to find that he willfully broke the law, then that gets into the subjective standard

MS. STEPHAN: I agree.

THE COURT: -- and that's not the law in this circuit. I am having no problem with saying that they have to find that he willfully made the statement. But I think the way the Third Circuit has interpreted the statute, that the government is not required to prove that he willfully made the true threat.

MR. COOPER: But if you say that he willfully [136] made the statement, how do you define the word "willfully"? What is the definition of that.

THE COURT: That is was knowing and that it was intentional.

MS. STEPHAN: It's synonymous with intentional.

MR. COOPER: Okay. Well, I think to preserve the position that we've had, you know, I'm asking for the instruction that we've outlined to be given, if the Court --

THE COURT: I think that confuses the jury because the instruction as you give it says that the jury has to find that he acted with a purpose to disobey or disregard the law. That means it was his purpose to make a true threat, and that's a subjective standard.

The law in this circuit is that it is an objective standard, so I think that's confusing.

MR. COOPER: All right. So if I'm -- just so I'm clear --

THE COURT: I'm going to clarify by -- I'm going to say the term "willfully" is used in the indictment. It really is synonymous with intentionally and knowingly, and that goes to whether he meant to say the statement, but to whether the statement is a true [137] threat is to be determined by the objective standard.

MR. COOPER: Okay. Just so we're clear for the record, Your Honor --

THE COURT: You're asking for a --

MR. COOPER: -- I'm asking for instruction number nine, and you're not going to give that.

THE COURT: That's right, that's right.

MR. COOPER: Okay. And that's my objection. THE COURT: Okay.

MR. COOPER: Thank you.

(Sidebar discussion concluded.)

THE COURT: Members of the jury, the indictment used the term "knowingly and willfully transmitted in interstate commerce." I have instructed you on the term "intentionally" which basically subsumes those terms.

The government must prove that the defendant knowingly and willfully made these statements. And I told you earlier that that really goes to the intent requirement.

Willfully basically means he knew what he was doing and he had an intent to do it. So those words basically are interrelated, but it goes to the intent

requirement.

The government must prove that the defendant [138] had the intent to make the statement, that is, the intent to make the Facebook posting. They don't have to prove that it was his subjective intent to state a true threat.

Whether the statement is a true threat is determined by this objective speaker standard, and that is what a reasonable person in the position of the defendant have known under all the circumstances that the communication that he made would cause fear in the recipient of that statement, and I defined that for you earlier in my instructions.

So the willfully and knowingly language is synonymous with intent. They have to prove that he willfully and knowingly made the statement, but whether or not it was a true threat is determined by that objective standard that I described.

APPENDIX R

[Transcript of Jury Trial – Day 3 – October 20, 2011]

[VERDICT]

* * *

[146] THE FOREPERSON: On the first count, Count 1, we find the defendant not guilty. On the second count, Count 2, we find the defendant guilty. On the third count, Count 3, we find the defendant guilty. On the fourth count, Count 4, we find the defendant guilty. On the fifth count, Count 5, we find the defendant guilty.

THE COURT: Thank you. Would you hand the verdict sheet to the deputy clerk.

Does either counsel see any reason why the verdict cannot be recorded?

MS. STEPHAN: No, Your Honor.

MR. COOPER: No, Your Honor.

THE COURT: At this time then I will ask the deputy clerk to record the verdict.

COURTROOM DEPUTY: Members of the jury, please rise.

Members of the jury, hearken unto your verdict as the Court has recorded it in the issue joined in this Indictment Number 11-13 between the United States of America and Anthony Douglas Elonis, you find as to the following; Count 1, not guilty, Count 2, guilty, Count 3, guilty, Count 4, guilty, and Count 5, guilty. If you agree, please say, yes.

[147] THE JURY: Yes.

APPENDIX S

[Judgment of Conviction]

AO 245B (Rev. 06/05) Judgment in a Criminal Case Sheet 1

UNITED STATES DISTRICT COURT
Eastern District of Pennsylvania

UNITED STATES OF AMERICA
v.
ANTHONY DOUGLAS ELONIS

JUDGMENT IN A CRIMINAL CASE

Case Number: DPAE2:11CR000013-001

USM Number: 66825-066

Ronald Levine, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s): ___.
☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.
☑ was found guilty on count(s) 2, 3, 4, and 5. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense
18 U.S.C. § 875(c)	Interstate Communication of Threats

Offense Ended	Count
11/15/2010	2

Title & Section	Nature of Offense
18 U.S.C. § 875(c)	Interstate Communication of Threats

Offense Ended	Count
11/15/2010	3

Title & Section	Nature of Offense
18 U.S.C. § 875(c)	Interstate Communication of Threats

Offense Ended	Count
11/16/2010	4

Title & Section	Nature of Offense
18 U.S.C. § 875(c)	Interstate Communication of Threats

Offense Ended	Count
11/30/2010	5

The defendant is sentenced as provided in pages 2 through 6 of this judgment. This sentence is

imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) one (1)

☐ Count(s) 1 and 2 of the Indictment. ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 19, 2012
Date of Imposition of Judgment

/s/
Signature of Judge

Lawrence F. Stengel, U.S. District Judge
Name of Judge Title of Judge

9/28/12
Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: ANTHONY DOUGLAS ELONIS
CASE NUMBER: DPAE2:11CR000013-001
Judgment — Page 2 of 6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

44 months as to Counts 2, 3, 4, and 5 all to run concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant be placed in an institution where his mental health needs can be met and where there is available mental health treatment. The Court recommends that the defendant be placed in an institution as close to Bethlehem, PA as possible. The court further recommends that the defendant be made eligible for the Bureau of Prisons' Inmate Financial Responsibility Program.

☑ The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

☐ at ____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2:00 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: ANTHONY DOUGLAS ELONIS
CASE NUMBER: DPAE2:11CR000013-001
Judgment — Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Three (3) years, as to each of counts, 2, 3, 4, and 5, all to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and

complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev.06/05) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: ANTHONY DOUGLAS ELONIS
CASE NUMBER: DPAE2:11CR000013-001
Judgment — Page 4 of 6

Additional Supervised Release Terms

The defendant shall comply with any Protection from Abuse Order or similar state court orders regarding the victims of this offense.

The defendant shall refrain from the use of alcohol and the illegal possession and/or use of drugs. He shall submit to testing to ensure compliance. It is further ordered that the defendant submit to evaluation and treatment as approved by the Court after receiving a recommendation by the U.S. Probation Office. The defendant shall abide by the rules of any program and remain in treatment until satisfactorily discharged with the approval of the Court.

The defendant shall participate in a mental health program for evaluation and/or treatment as approved by the Court after receiving a recommendation by the U.S. Probation Office. The defendant shall remain in treatment until satisfactorily discharged with the approval of the Court.

The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the

investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine or restitution obligation. The defendant shall not encumber or liquidate interests in any assets unless it is in direct service of the fine or restitution obligation or otherwise has the express approval of the Court.

The defendant shall submit to an initial inspection by the U.S. Probation Office and to any examination during supervision of the defendant's computer and any devices, programs, or application. The defendant shall allow the installation of any hardware or software systems which monitor or filter computer use. The defendant shall abide by the standard conditions of computer monitoring and filtering that will be approved by this Court. The defendant is to pay the cost of the computer monitoring not to exceed the monthly contractual rate, in accordance with the probation officer's discretion.

The defendant shall pay to the United States a total special assessment of $400.00, which shall be due immediately. It is recommended that the defendant participated in the Bureau of Prisons' Financial Responsibility Program and provide a minimum payment of $25.00 per quarter towards the special assessment.

The defendant shall notify the United States Attorney for this district within 30 days of any

change of mailing address or residence that occurs while any portion of the special assessment remains unpaid.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: ANTHONY DOUGLAS ELONIS
CASE NUMBER: DPAE2:11CR000013-001

Judgment — Page 5 of 6

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$400.00	$0.00	$0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $0.00 $0.00

☐ Restitution amount ordered pursuant to plea agreement $____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the

  ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 6 — Criminal Monetary Penalties

DEFENDANT: EUWAN PLAYFAIR [*sic*]
CASE NUMBER: DPAE2:11CR000304-001 [*sic*]

Judgment — Page 6 of 6

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $_____due immediately, balance due
☐ not later than ___ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C ☐ D, or ☐ F below); or

C ☐ Payment in equal ____ *(e.g., weekly, monthly, quarterly)* installments of $ ___ over a period of ___ *(e.g., months or years)*, to commence ___ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal ____ *(e.g., weekly, monthly, quarterly)* installments of $ ___ over a period of ___ *(e.g., months or years)*, to commence ___ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ___ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay to the United States a total special assessment of $400.00, which shall be due immediately. It is recommended that the defendant participate in the Bureau of Prisons' Financial Responsibility Program and provide a minimum payment of $25.00 per quarter towards the special assessment.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX T

[Order Granting Certiorari]

(ORDER LIST: 573 U. S.)

MONDAY, JUNE 16, 2014

CERTIORARI GRANTED

13-983 ELONIS, ANTHONY D. V. UNITED STATES

The petition for a writ of certiorari is granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U. S. C. §875(c) requires proof of the defendant's subjective intent to threaten."

No. 13-983

In the Supreme Court of the United States

ANTHONY D. ELONIS, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX
VOLUME II—EXHIBITS

JOHN P. ELWOOD
Counsel of Record
RALPH C. MAYRELL
DMITRY SLAVIN
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Petitioner

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
U.S. DEPARTMENT OF JUSTICE
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent

[Additional Counsel Listed On Inside Cover]

PETITION FOR CERTIORARI FILED FEBRUARY 14, 2014
CERTIORARI GRANTED JUNE 16, 2014

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Fl.
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924–3127

CONOR MCEVILY
VINSON & ELKINS LLP
1001 Fannin Street
Suite 2500
Houston, TX 77002
(713) 758-2222

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Created 2010-10-20 23:21:50 UTC
Link http://www.facebook.com/permalink.php?story_fbid=147480825298827&id=100001408555814
Summary
Text So raise your glass if you are wrong in all the right ways All my underdogs We will never be, never be Anything but loud And nitty gritty, dirty little freaks Won't you come on and come on and Raise your glass! Just come on and come on and Raise your glass! Slam, slam, oh hot damn What part of a party don't you understand? Wish you'd just freak out (Freak out already) Can't stop, coming in hot I should be locked up right on the spot It's so on right now (so fucking on right now)
Title P!nk - Raise Your Glass (Official Explicit Version & Lyrics)
Url http://www.youtube.com/watch?v=ChEE0_OPblw

Status Updates

Posted 2010-12-08 15:13:03 UTC
Status "It's been the longest winter without you I didn't know where to turn to See somehow I can't forget you after all that we've been through I couldn't turn on the TV without something there to remind me Was it all that easy to just put aside your feelings? It'll all get better in time"
Mobile 1

Posted 2010-12-08 04:07:52 UTC
Status If there was one man I'd go gay for, that man's name would be Buddy Rumble.
Mobile 1

Comments
User Buddy Rumble (664881770)
Text haha your silly
Time 2010-12-08 04:08:49 UTC

User Tone Dougie (100001408555614)
Text My silly is my horny. lol
Time 2010-12-08 04:14:27 UTC

User Omar Lozano (100000079911835)
Text Excellent choice Tone!
Time 2010-12-08 04:23:30 UTC

User Nate Kinsell (752551193)
Text Wow, I'm with you Tone...LOL
Time 2010-12-08 04:31:20 UTC

Posted 2010-12-08 00:20:24 UTC
Status I would like to express my sincere condolences to the family of Elizabeth Edwards.
Mobile 1

Posted 2010-12-07 17:08:21 UTC
Status Whether it was running away a week before my son was supposed to start kindergarten and making his Daddy miss his first day of school or making my daughter miss her second year of preschool with Ms. Karen, she has done everything she can to disenfranchise those children for her own selfish desires. She's as cruel and immature as the day I met her and she doesn't deserve to have my children.
Mobile 1

Posted 2010-12-07 14:45:27 UTC
Status 3 - If I had to choose one reason to stay in that godforsaken town, you'd be it. I miss you. Everyone else, not so much. Really, the only reason I came out was to see you. And I'll always remember the first time we met. I think about you often ___ ___. It rhymes. :-p
Mobile 1

Comments
User Jeffrey Kleckner (100001129352642)
Text now thats the kind of lyrics u need to keep posting instead of the violent shit love , lol ur more a lover than a fighter, u just let ur anger and bad emotions get u to a point where u think u have to be nasty and violent , and I know deep down inside thats not my tone! haha

Case 5:11-cr-00013-LS Document 24-1 Filed 08/24/11 Page 2 of 2

Text lmfao. thats kay....college life = all nighters...thats if you procrastinate enough to have two papers due that you have not totally finished yet...that are due on a monday at 11am :D
Time 2010-11-01 01:53:37 UTC

Posted 2010-10-30 12:37:57 UTC
Status And Goodbye Al Qaeda Sympathizers! Arya Ramin, Ben Lagler, Chelsey Thiviergs, James Cech, Katherine Elizabeth Laniewski, John Beaupré, Tasha Sward
Mobile

Comments
User Katherine Elizabeth Laniewski (1014127077)
Text dude yur whack. keep my name out of your status'. im not gona lose my jobs cause someone like you are posting retarded stuff. and i dont appreciate you puttin my name in your status at all
Time 2010-10-31 05:14:30 UTC

User Tone Dougie (100001408555614)
Text "Defamation must also be believable in order to be considered damaging to a person's reputation." So get in line and sue me!
Time 2010-10-31 07:49:07 UTC

User Katherine Elizabeth Laniewski (1014127077)
Text no your just someone who likes all the gay attentionnn. but next time keep my name out of your shit and I wont have a problem
Time 2010-11-01 16:27:23 UTC

User Tone Dougie (100001408555614)
Text Using gay as a derogatory adjective? Shame on you Katherine, shame on you. :-p And it would seem that I've been the little attention whore extraordinaire lately but really, I'm doing this for me. My writing is therapeutic. Keep your name out of it? Never! Not now. You called me whack and gay. :-O You're like my new arch-nemesis. I have to battle you in the name of civil rights. Lyrically of course.
Time 2010-11-01 18:26:21 UTC

Posted 2010-10-30 12:33:42 UTC
Status Hello New Facebook Friends! @[587183101:2048:Courtney Marie], @[1840008475:2048:Jackie Kane], @[1000000403541152048:James Pierce], @[559555091:2048:Kati Ann Kroninger]
Mobile

Comments
User Courtney Marie (587183101)
Text Hello :)
Time 2010-10-30 14:04:27 UTC

Posted 2010-10-30 08:22:42 UTC
Status I don't need to rehearse to spit my verse, so sick it'll make your appendix burst, beat so loud it'll make your eardrums hurt, slip this in a drink, make your girl lose her skirt, fuck her with a dick so big it'll make her asshole bleed, for five whole days cause I'm a lyrical rapist, So read the papers or don't, like planes fallin' out the sky on Election Day, y'all gonna take notice anyway.
Mobile 1

Posted 2010-10-28 12:05:20 UTC
Status All characters appearing in this work are fictitious. Any resemblance to real persons, living or dead, is purely coincidental.
Mobile

Comments
User Tone Dougie (100001408555614)
Text Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
Time 2010-10-28 12:06:10 UTC

Case 5:11-cr-00013-LS Document 24-2 Filed 08/24/11 Page 2 of 2

© 2010 Cedar Fair Entertainment Company

+ Write a Note

Tone Dougie [illegible]

I'm going to have lots of fun writing this note. I'm ready to dish the dirt on my termination. It's going to feel so good. Ready?

I was fired from my job at Dorney Park & Wildwater Kingdom on Sunday, October 17, 2010.

The primary reason given was due to a profile picture I uploaded that same day with a caption, "I Wish." This was a consensual photo taken during last year's Halloween Haunt.

There is no way that these two syllables constitute a real or legitimate threat given the context of the photo. You'll need something more to win an unemployment appeal. So let's discuss that, shall we?

I have repeatedly stated that my status updates are rap lyrics and that they are fictitious and thus not representative of my values, views, or beliefs. I never stated names. All characters that appear in my work are fictitious. Any resemblance to real persons, living or dead, is purely coincidental.

I believe you are going to attempt to connect a real person to a fictitious status update that contains illegal activity, specifically 18 Pa.C.S. § 3129. Good luck with that. Keep in mind, your statements will be part of the court record in the form of audio recording for which the transcript will be available and potentially disseminated online. Does the person really want their employer to do this? Honestly, Big Tone's sitting here pulling lint out of his pockets. Cedar Fair Entertainment Company's pockets are much deeper than his. My capacity to forgive knows no bounds. I sincerely wish her the best in her future lawsuit. Which reminds me of my next topic.

I was once a Department Supervisor. I was schooled on the importance of progressive, documented disciplinary action. There is none in my case. What there is is an impressive stack of witness statements written about me. If you use the against me at the hearing, I will have access to these documents. I would love to put names to the false statements contained within them. I would have a field day with all that legitimate defamation.

I told Ann Jones that the allegations against me were false. I told her who to investigate. Unfortunately, she's apparently too fat and lazy to do her job correctly. One need only look to the piles of paperwork on her desk to see that you she can't keep up with her workload. If Cedar Fair keeps her on board after the season, they're much crazier than I. Thankfully, opinion is protected speech.

And just so everyone knows, I was asked to stay in Park Operations with the responsibility of doing scheduling and orientations. I turned the offer down. Mostly because I did not want to remain in a department where most of the leadership had no values or qualifications to progress past the Ride Operator position. I'm talking about the people below Keith and Hindy, both of which I have the utmost respect for.

In the end, I'm so thankful to finally be free. I gave too much of my time and effort and got little to no respect. It's a shame because I loved the Park and I loved the industry.

When I stood up before you at Orientation and spoke of the need to watch your water because I didn't want my children at the bottom of your pool and the need to be vigilant at your rides because I didn't want to respond to an incident where you had been seriously injured or killed, the tears in my eyes were real. There's not many employees that have the same passion and devotion that I had for that place.

Someone once told me that I was a firecracker. Nah, I'm a nuclear bomb and Dorney Park just fucked with the timer. :-)

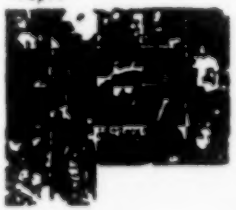
If I was the General Manager, I'd be on the phone with Sandusky discussing a damage control plan.

- Tone's Notes
- Notes About Tone

Browse Notes
- Friends' Notes
- Pages' Notes
- My Notes
- My Drafts
- Notes About Me

Jump to Friend or Page

Tagged



Subscribe

Tone Dougie's Notes

Report

Sponsored Create an Ad

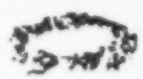
New Hidden Object Game

Play the new addicting hidden object game on Facebook!

Play Jewelcraft

Love puzzle games? You've gotta play Jewelcraft! 100% Free to play at Arcadeweb.

Daughter Charm Bracelet



Heartfelt wishes for your daughter are always close at hand when you show your love with this Swarovski crystal stunner. Shop Now!

Dr Oz - Lose 30lb Monthly

Lose 9 pounds a week following the 1 FREE diet tip discovered by Dr Oz.

330

GOVERNMENT EXHIBIT

Tone Dougie

{This one needs its own disclaimer. These are fictitious lyrics and I am only exercising my Constitutional right to Freedom of Speech. Ready?} BOOM! BOOM! BOOM! You got the towers baby I got the planes and the 2010 season going out with a *explosion* *static* We are live on the scene here at [censored] in Allentown, Pennsylvania where, what's being reported to us as, a twin-engine Cessna just struck the... OMG! Another one's coming in? Get down! *static* Someone better tell Dick yo hurry up quick and preemptively activate the EAP. I thought I told y'all mother fuckers DON'T FUCK WITH ME?

ACLU Sues Pennsylvania School District Over Expulsion of Middle School Rapper for Songs Written at H

www.aclu.org

PITTSBURGH--The American Civil Liberties Union of Pennsylvania today filed a federal lawsuit on behalf of a 14-year-old rap artist and his parents charging that the Riverside Beaver School District violated the student's First Amendment free speech rights by expelling the boy for rap music he wrote ...

Like Comment Share

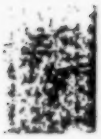
Tone Dougie

Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the fuckin' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so fuckin' scary?

October 22, 2010 at 3:50pm Like Comment

View all 44 comments

Write a comment...



Tone Dougie

"Hi, I'm Tone Elonis.
Did you know that it's illegal for me to say I want to kill my wife?
It's illegal.
It's indirect criminal contempt.
It's one of the only sentences that I'm not allowed to say.
Now it was okay for me to say it right then because I was just telling you that it's illegal for me say I want to kill my wife.
I'm not actually saying it.
I'm just letting you know that it's illegal for me to say that.
It's kind of like a public service.
I'm letting you know so that you don't accidentally go out and say something like that.
Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.
That's illegal.
Extremely illegal.
Very, very illegal.
But not illegal to say with a mortar launcher.
Because that's its own sentence.
It's an incomplete sentence but it may have nothing to do with the sentence before that.
So that's perfectly fine.
Perfectly legal.
I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.
Insanely illegal.
Ridiculously, wreckdessly, insanely illegal.
Yet even more illegal to show an illustrated diagram.

===[__]=====house

::::::::^::::::::::::::cornfield
::::::::::::::::::::::::
::::::::::::::::::::::::
::::::::::::::::::::::::
############getaway road

Insanely illegal.
Ridiculously, horribly felonious.
Cause they will come to my house in the middle of the night and they will lock me up.
Extremely against the law.
Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic semper tyrannis."

Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?

Whitest Kids U Know: It's illegal to say...
gdata.youtube.com
Whitest Kids U Know sketch. www.whitestkids.com

[illegible] Like Comment Share

Tone Dougie

Fold up your PFA and put it in your pocket
Is it thick enough to stop a bullet?
Try to enforce an Order
that was improperly granted in the first place
Me thinks the Judge needs an education
on true threat jurisprudence
And prison time'll add zeros to my settlement
Which you won't see a lick
cause you suck dog dick in front of children
And if worse comes to worse
I've got enough explosives
to take care of the State Police and the Sheriff's Department

Freedom of speech - Wikipedia, the free encyclopedia
en.wikipedia.org

Freedom of speech is the freedom to speak freely without censorship or limitation, or both. The synonymous term freedom of expression is sometimes used to indicate not only freedom of verbal speech but any act of seeking, receiving and imparting information or ideas, regardless of the medium used. I

November 15, 2010 at 4:05pm Like Comment Share

GOVERNMENT EXHIBIT

Tone Dougie

That's it, I've had about enough
I'm checking out and making a name for myself
Enough elementary schools in a ten mile radius
to initiate the most heinous school shooting ever imagined
And hell hath no fury like a crazy man in a Kindergarten class
The only question is... which one?

November 16 2010 at 9:18am Like Comment

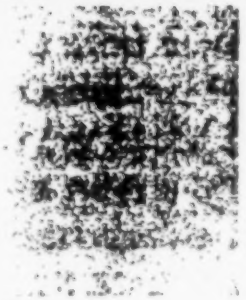
Pieter Cos likes this.

Write a comment...

Free Hotmail

Lady (1)

facebook | Search | Home | Profile | Find Friends | Account



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Tone Dougie's Notes

Report

Little Agent Lady

+ Write a Note

by Tone Dougie on Tuesday, November 30, 2010 at 3:01pm

You know your shit's ridiculous
when you have the PRE kneelin' at ya' door
Little Agent lady stood so close
Took all the strength I had not to turn the bitch ghost
Pull my knife, flick my wrist, and slit her throat
Leave her bleedin' from her jugular in the arms of her partner

[laughter]

So the next time you knock, you best be serving a warrant
And bring ya' SWAT and an explosives expert while you're at it
Cause little did y'all know, I was strapped wit' a bomb
Why do you think it took me so long to get dressed with no shoes on?
I was jus' warin' for y'all to handcuff me and put me down
Touch the detonator in my pocket and we're all gain'

[BOOM!]

Are all the pieces comin' together?
Shit, I'm just a crazy sociopath
that gets off playin' you stupid fucks like a fiddle
And if y'all didn't hear, I'm gonna be famous
Cause I'm just an aspiring rapper who likes the attention
who happens to be under investigation for terrorism
cause y'all think I'm ready to turn the Valley into Falluja
But I ain't gonna tell you which bridge is gonna fall
into which river or road
And if you really believe this shit
I'll have some bridge rubble to sell you tomorrow

[BOOM!][BOOM!][BOOM!]

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Elios Louis Vuitton $34
pricedumper.com

Today ONLY: Brand New Genuine Louis Vuitton Purse for $34.17. That's 95% Off - Click Here to Read More.

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arcadeweb.com

Love puzzle games? You've gotta play Jewelcraft! 100% Free to play at Arcadeweb.

Antidepressants not work?
depressiontreatmentalternatives.info

When drug therapy fails - there is a effective non-drug option in Philadelphia area. Learn more now. Get free information.

Fans, Friends & Family!
LEVIS

Friends and Family is here! Get 30% off sitewide with promo code FRIENDS. Hurry, offer ends on Mon, May 23rd! Online only.

GOVERNMENT EXHIBIT 7

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Stephanie Lynn (9315918)
Tori Sweeney (9318843)
Josh Stauffer (9508787)
Jarrett A. Jaskot (14225731)
Christina Lamson (20910261)
Liz Bluis (26805836)
Jill Hoffmaster (26812040)
Bethany Lynn (35909236)
Tanya Konek (37800383)
Brittney Ryan (38809526)
Erin Elizabeth (38809634)
Kayleen Balliet (38809944)
Caitlin Foley (38810023)
Gordon Brile (43601120)
Danielle Lynn (43602910)

Ashley Williams (47500012)
Bob Sharpe (48500064)
Eva Freeh (48507758)
Jesse Kasper (49101448)
Christina Laury (50705381)
Jason Fegley (50705411)
Travis Baker (73800591)
Brianna Foley (77500126)
Amanda Osborn (83000927)
Andrew Rozwadowski (213002868)
Phil Roth (213600715)
Kevin P. Burns (330500007)
Donald Woodstock Malloy (330500032)
Eric Snyder (330500189)
Ian Tough (330500608)
Dave Witoslawski (330500682)
Mike Sansone (502437379)
Jos McAdam-Sellers (503416382)
Jason Smith (505172583)
Joanna Rosiak (507631427)
Dennis Corby Jr (507691452)
Matt Redline (508815218)
Angela Gutiérrez (509419285)
Callum McQueen (511167207)
Matea Matevska (513369931)
Amber Rambo Solá (513387144)
Charles Reichard (521935012)
Megan Amey (522695835)
Jason McClure (523247190)
Dan Clementi (524249565)
Nikki Moyer (526870279)
Alexandra Puentes (530198379)
José Solá (535551909)
Jay Strouse (536431976)
Jeremy Nagle (536955317)
Roberto A. Rodriguez (537272489)
Chris Kerns-Kallahan (539617780)
Jaide Grim (540304178)
Veronica Lovato (541342669)
Heather Plasson (541490831)
Jaime Dawson (544616132)
Lucia Batallas (547590122)

Andrew Nemeth (548156438)
Jorge Andrade (554141180)
Andrew Charles Trumbore (557078790)
Kaktwi McFatburg (559555091)
Jesus Familia (560279348)
Diego Alejandro Romero Córdoba (562222012)
Michael King (565505213)
Courtney Marie (567183101)
Josh Johnson (568274013)
Natalia Zambrano (568549953)
Diego Fernando Silva (570656348)
Amanda Lynne (571584844)
Colton Moyer (572811620)
Jacob Heft (575497600)
Scott A. Smathers (576411350)
Milagros Shupp (590829803)
Alexander Quiros (596827812)
Anamaría Franco (597105482)
Brian Fitch (599276256)
Kaleigh Martin (600338094)
Derek Garman (600978583)
Kristen Marie Heffelfinger (601448961)
Justin K. Gomez (603842070)
Griff Mooga McLovinn (604280829)

Kelcie Muschlitz (605721515)
Lina Andrea Torres Samboni (606712500)
Michelle Ahrens (606908480)
Sol Freire (609160036)
Rick Binder (611537756)
Michelle Lynn (618438544)
Benjamin Ruth (620758688)
Michael James Halko (620942532)
Ryan Wirth (626737516)
Kelsey Buscavage (629211985)
Pedro Sanchez (631090858)
Sebastian Coral (636128436)
Chelsey Thivierge (639420815)
Charles Hutchison (644734708)
Vanessa Ladino (647457042)
Vince Morrow (648286175)
Fabian Alejandro Ochoa Ortiz (655700701)
Enoe Sanchez (655764549)
Eleana Peñafiel (658501798)
Heather Haefele (662390983)
Ciarra Verga (662816598)
Uzo Acholonu (663083802)
Luis Perez (664027555)
Buddy Rumble (664881770)
Brian Webb (667726254)
Gabriel Farraye Maeri (668195066)
Liz Welch (668421375)
Daniel Hall (669929747)
Nathalia Zapata Moreno (671080458)
Daniela Vargas (671111502)
Morgan Kennedy (671174250)
Tyler Pyaher (677295552)

Matthew Kardos (678160525)
Tia McIntyre (678829936)
Adam Gilfert (681296620)
Josh Kroon (683674133)
Katrina Wickel (688933975)
Paola Sarmiento Giraldo (694284828)
Christina Powell (696404178)
Mario Ramos (698777299)
Bert Cos (700924528)
Maria Emilia Moya (704020004)
Joe Bell (704501713)
Ivan Montalvo (705821806)
Keir Sean Llewellyn (710737108)
Gary Boettger (711935516)
Jenny Mora (712225984)
Austin Scarlett (718312274)
Brittney Hertzog (721713390)
Jennifer Ramirez (725782908)
Carmita Liguicota (726906324)
Joey Roz (726969326)
Andres Mauricio Rua (727467906)
Johan Cos (728813921)
Ricky Conklin (737018040)
Liz Elizabeth Peralta (744973058)
Daniel Felipe Hernandez (746086048)
Brett Reppert (749593627)
Kalief M. Robinson (751807161)
Nate Kinsell (752551193)
James Douglas Pursell (756156873)
Brittany Kidd (757451802)
Abby Zappenfelt (758106521)
Yesenia Parra (763358767)
Tonia Connors (768219395)
Charles M Gerrity (772182194)

Catalina Andrade (772410610)
Michael Catanzaro (773242068)
Camille Ortiz (795138367)
David Lee Jr. (798715313)
Vivian Salamanca (819475594)
Chelsea Mondrick (825042486)
Joha Garzon (833344950)
Christopher Deatrick (885870570)
Aaron Chado Machado (887135012)
Jana Broskova (1013368886)
Roger Kemp (1029162355)
Sheena Stoudt (1045634727)
Mike Jones (1064318705)
Michael DeCero (1066653578)
Ryan Smith (1070345178)
Eric Kalman (1078715755)
Colin Holmes (1082691490)
Nicole Lutsco (1084931457)
Matt Miller (1095061151)
Angela Boecker (1115420979)
Ashley Erickson (1121944598)
Stephen Wolff (1142050176)
Ines M Henry (1148431054)
Brittany Specht (1148712355)
KatieRae Hunsicker (116647742
Aaron Bambino Schultz (117462
Nick Krivosh (1189561670)

Ida Adorno (1189697119)
Anthony Vazquez (1200028077)
Mary Kate Boyle (1226490117)
Kayla Kester (1227054748)
Trisheena Nichole Whitehead (1241144570)
Yomar A. Quiros (1264503274)
Carlita Cruz (1279609602)
Natasha Vazquez (1289243979)
Ryan Potcher (1324760670)
Caitlin Hirsch (1332420050)
Nicholas Gareca (1332473837)
Darliuz Figueroa (1336083142)
Maja Capova (1346401057)
Martina Capova (1364731066)
Kristin Bechtel (1375432026)
Robert Mac Nally (1379291571)
Jennifer Jackson (1408946881)
Tiana D Licous (1434675130)
Carola Gonzalez Coerne (1447548750)
Anthony Levan (1450574706)
Zonia Burgos (1457730147)
Matt Coe (1457790480)
Dan Lebo (1457820079)
Kali Kleckner (1457850072)
Kyle Missimer (1457850093)
Kate Arugula Pruett (1458420034)
Chelsey Willinger (1462290247)
Charlene Guerrero (1463291482)
Daniel Balthaser (1464090069)
Paul Bohan III (1464540145)
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Amy Doby (1476413901)
Orquides Martinez (1482210018)
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Christine Peters (1678080003)
Wesley Malkits (1716741313)
Abel Pumba Sostre Lugo (1736959090)
Alyssa Rivera (1748416794)
Katie Delbertis (1754424139)
Jovarne Barnes (1781860306)
Stephen Sagi (1796081763)
Kristen Levan (1807192678)
Jackie Kane (1840008475)

Tu Sofokehh (100000036553921)
James Pierce (100000040354115)
Roy Truss (100000053350885)
Jamane Herod (100000058403444)
Nelson Javier Velez (100000066606138)
Omar Lozano (100000079911835)
Rob Gebhardt (100000081968280)
Mark Gonzalez (100000110484752)
Michael Picarello (100000119402373)
Timothy Taylor (100000121603321)
Christina Rosario (100000130355478)
Catharine Berean (100000150939599)
Stephanie Cherice (100000185321206)
Crystal Good Kratz (100000191703974)
Sheena Kleckner (100000193954327)
Jenna Brensinger (100000208688519)
Marcus Wade (100000209292437)
Lorie Bogert (100000233025930)
Gabrielle ThaaBoss Daniel (100000282491876)
Devon James (100000285223795)
Hope Navarro (100000351201544)
Shaina Spenzierato (100000376607589)
Cynthia Gonzalez (100000420415994)
Donna HomerSlut (100000429747745)
Damien Diaz (100000458560805)
Ty Mendock (100000480919007)
Jessica Sevenfold (100000497951168)
Uyanga Erka (100000523573941)
Marangell Morales (100000529010587)
Sandra Quiros (100000590058413)
Aaliyah Lv Smith (100000630698838)
Joshua Effting (100000724458264)
Roy Gangaway (100000774702499)
Tricia Bonikowski (100000808943419)
Carlos Roman (100000865384233)
Arlette Alexander (100000921641876)
Liz Cartagena (100000927072704)
??????? ??????? (100000988678070)
Byron Rodriguez (100001124562640)
Jeffrey Kleckner (100001129352642)
Derlynes Camilo (100001158897137)
Marina Karandasheva (100001208442112)
Steve Valdez (100001240251537)
Engile Lopez-Ortiz (100001247943301)
Princess Monplaisir (100001521804634)
Jason Safi (100001545303577)

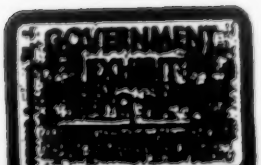
Ivette Romero Garcia (100001655386585)

Heather Martin (100001669598686)
Kevin Myster (100001693271978)
Wendy Love (100001757086330)
Shaina Hill (100001860444969)
Iris Lopez (100001875793571)

Author Tone Dougie (100001408555614)
Sent 2010-11-04 23:59:44 UTC
Body I wouldn't spill the beans on you. You're my favorite Park Ops employee Omar. And I'm thankful for the friendship we've developed.

I admit I was pretty nasty to Heather but that bitch deserved it. lol

Oh well, my facebook is public anyway. I could care less if people delete me.



Facebook | Photos of Anthony Elonis - Windows Internet Explorer

File Edit View Favorites Tools Help

facebook.com

Favorites Suggested Sites Free Hotmail Get More Add-ons

Facebook | Photos of Anthony Elonis

facebook Search

Photos of Anthony Elonis

Photo 7 of 56 Photos of Anthony · Anthony's Profile

Previous Next

I wish.

In this photo: Anthony Elonis (photos)

Edited Comment Like

Zonia Burgos So this picture is why you are fired. Gayest piece of shit I've ever heard.

October 19 at 10:52pm Like · 1 person Flag

Write a comment...

From Profile Pictures : Anthony Elonis

Share

Tag This Photo

Report This Photo

GOVERNMENT EXHIBIT 11

Facebook © 2010 · English (US)

About Advert

start

Facebook | Anthony Elonis - Mozilla Firefox

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http://www.facebook.com/home.php?#!/profile.php?id=100001408555614

Most Visited Getting Started Latest Headlines

Facebook | Anthony Elonis

Do you want Firefox to remember the password for "luckicharms0003@aol.com" on Facebook.com?

Remember | Never for This Site | Not Now

7 friends in common See All

Tasha Sward | Nick Krivosh | Sarah Ann Lelia Hill

Friends

305 friends See All

Colin Lynch | Colum McQueen | Phil Roth

Chelsey Wilfinger | Morgan Kennedy | Tasha Sward

Likes

45 likes 3 likes in common

The Hangover | The Spill Canvas | AKON

Photos

2 of 3 albums See All

Anthony Elonis If I only knew then what I know now... I would have smothered your ass with a pillow. Dumped your body in the back seat. Dropped you off in Toad Creek and made it look like a rape and murder.

about an hour ago Comment Like

Tasha Sward your fucking mentally disturbed.. just saying.

17 minutes ago · Like

Anthony Elonis Thanks Tasha. I'll take that as an expert opinion. haha!

14 minutes ago · Like

Write a comment...

Jessica Sevenfold ♥1) Something I've learned about you by looking at your wall:that yoy are like me with the lyric status 2) The color you remind me of : red 3) My first memory of you: a cop with a 14in dildo...haha funny shit 4) The animal you remind me of: jack rabbit 5) Ask something I've always wondered about you: are u,suresee ur no...

See More

about an hour ago Comment Like

Anthony Elonis If you don't have anything nice to say, don't say anything at all? Fuck that Third Reich philosophy! It breeds too many niggas 'fraid to speak out from injustice.

about an hour ago Comment Like

Anthony Elonis Yeah, I went there.

I ♥ black people. And gays. I even have a small place in my heart for horse blowers.

Nah, nah... bite me!

about an hour ago · Like · 1 person

You could be featured in Victoria's Secret PINK's Style U! See real campus fashions and add the game day look you love at vspink.com.

Yahoo! News

Photo contest: Photograph a Yahoo! News lawn sign to win $5,000! Click the photo to get your sign and enter to win today!

Veronica Rosario likes this.

Like

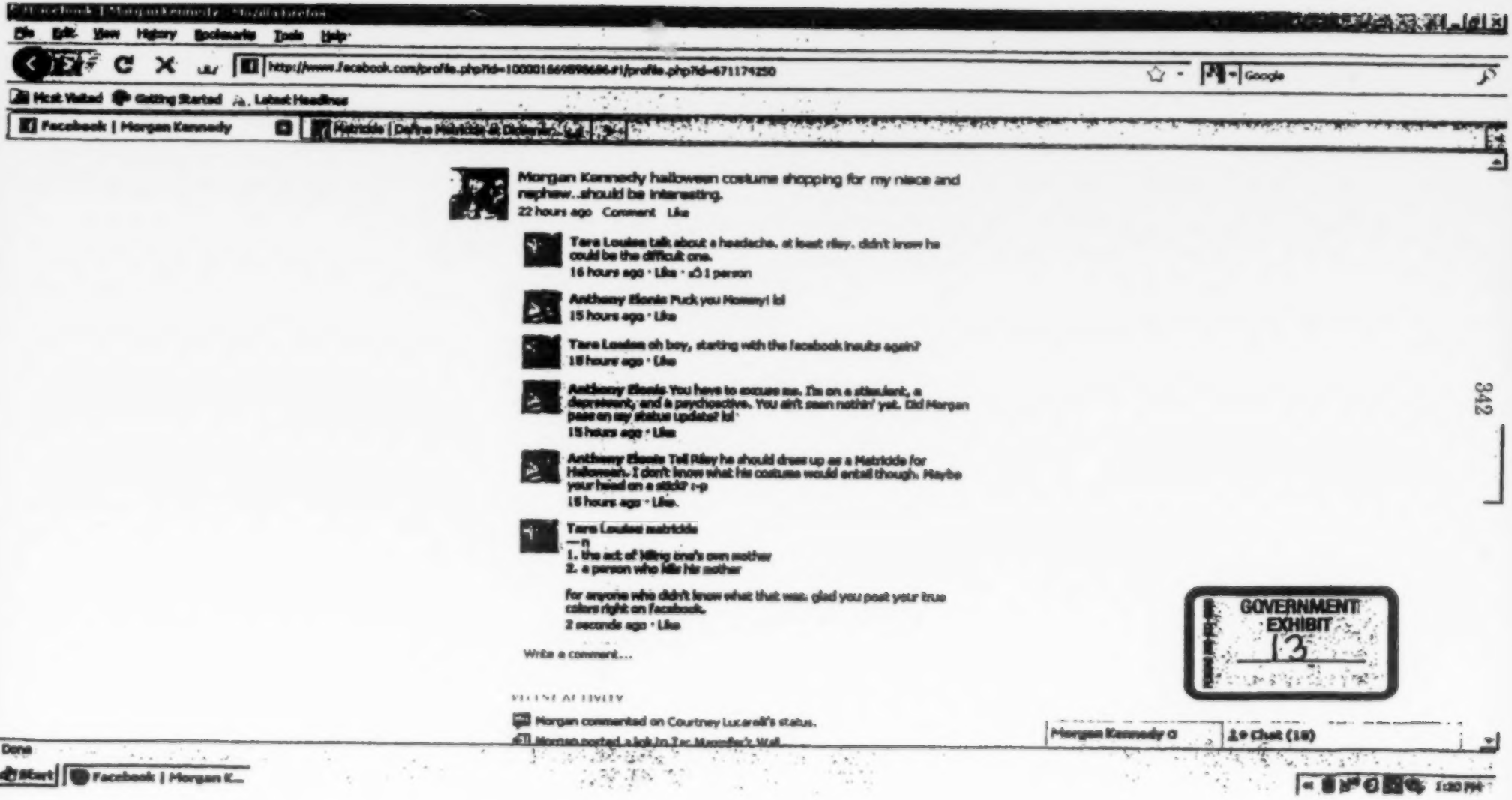
More Ads

GOVERNMENT EXHIBIT 12

Tara Louise | Courtney Lucarelli | Kenny Grey | Marc Kress | Chat (64)

Transferring data from photos-a.ak.fbcdn.net...

Start | Facebook | Anthony ... | 12:55 PM



Facebook | Morgan Kennedy - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://www.facebook.com/profile.php?id=100001669898686#!/profile.php?id=671174250

Most Visited Getting Started Latest Headlines

Facebook | Morgan Kennedy | Matricide | Define Matricide at Dictionary

Morgan Kennedy halloween costume shopping for my niece and nephew..should be interesting.
22 hours ago Comment Like

Tara Louise talk about a headache. at least riley. didn't know he could be the difficult one.
16 hours ago · Like · 1 person

Anthony Elonis Fuck you Mommy! lol
15 hours ago · Like

Tara Louise oh boy, starting with the facebook insults again?
15 hours ago · Like

Anthony Elonis You have to excuse me. I'm on a stimulant, a depressant, and a psychoactive. You ain't seen nothin' yet. Did Morgan pass on my status update? lol
15 hours ago · Like

Anthony Elonis Tell Riley he should dress up as a Matricide for Halloween. I don't know what his costume would entail though. Maybe your head on a stick? :-p
15 hours ago · Like.

Tara Louise matricide
—n
1. the act of killing one's own mother
2. a person who kills his mother

for anyone who didn't know what that was. glad you post your true colors right on facebook.
2 seconds ago · Like

Write a comment...

RECENT ACTIVITY

Morgan commented on Courtney Lucarelli's status.

Morgan posted a link to Tac Marmifer's Wall

GOVERNMENT EXHIBIT 13

Morgan Kennedy | Chat (18)

Done

Start | Facebook | Morgan K...

1:20 PM

Facebook | Anthony Elonis - Windows Internet Explorer

http://www.facebook.com/home.php?#!/profile.php?id=100001408353614

Favorites | Suggested Sites | HP - See What's Hot | Web Slice Gallery

Facebook | Anthony El... | 16 and Pregnant (Season 2... | First Commonwealth Fede...

Page | Safety | Tools

facebook

Search

Home | Profile | Account

View Photos of Anthony (53)
View Videos of Anthony (7)
Send Anthony a Message
Poke Anthony

Anthony Elonis If there's any truth to these lyrics, don't they cut like a knife? Fuck you bitch! All I wanted was a wife and family to call my own. Now I'm living in the zone saying fuck this world. Like it owes me money and I'm a make it pay.

Wall | Info | Photos | Formspring

Write something...

Attach: | Share

Filters

Anthony Elonis If there's any truth to these lyrics, don't they cut like a knife? Fuck you bitch! All I wanted was a wife and family to call my own. Now I'm living in the zone saying fuck this world. Like it owes me money and I'm a make it pay.
7 hours ago via Mobile Web · Comment · Like

Anthony Elonis What's your name bitch? Cause you about to get trashed. Blaming Jerry, yet the whole time you be fuckin' your boss. Thanks for setting the example for your hoe daughters to follow. Is this shit becoming too hard to swallow? You couldn't have been too good of a parent. Make your teenage daughter wanna be a mother. To erase the hate that you done give. You should be so lucky that I let you live.
8 hours ago via Mobile Web · Comment · Like

Anthony Elonis was at Candida with Omar Lozano and Jeffrey Kleckner.
9 hours ago · View Post

Create an Ad

Want to be a Photographer
ai.photographyschools.com

Fill out this form to see if you qualify for financial aid to earn your photography degree in less than 2 years.

K-Town Homecoming Shirts!

Andrew Fogley | Tara Louise | Courtney Lucarelli | Kenny Gray | Marc Kress | Chat (48)

Internet | Protected Mode: On | 100%

GOVERNMENT EXHIBIT 14

Facebook | Anthony Elonis - Mozilla Firefox

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http://www.facebook.com/#!/profile.php?id=100001408555614&sk=wall

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Facebook | Anthony Elonis

facebook Search Home Profile Account

View Photos of Anthony (65)

View Videos of Anthony (2)

Send Anthony a Message

Poke Anthony

DISCLAIMER: ALL CONTENT POSTED TO AND BY THIS ACCOUNT IS STRICTLY FOR ENTERTAINMENT PURPOSES ONLY AND DOES NOT REPRESENT THE VIEWS, BELIEFS, OR VALUES HELD BY ANTHONY ELONIS, THE PERSON. lol

Information

Relationship Status:

Anthony Elonis

Add as Friend

Wall Info Formspring

Filters

Anthony Elonis There's one way to love ya but a thousand ways to kill ya,
And I'm not gonna rest until your body is a mess,
Soaked in blood and dying from all the little cuts,
Hurry up and die bitch so I can bust this nut,
All over your corpse from atop your shallow grave,
I used to be a nice guy, then you became a slut,
I guess it's not your fault you liked your daddy raped you,
So hurry up and die bitch so I can say I forgive you
about an hour ago · Comment · Like

Anthony Elonis Who's gonna buy your whistles?

love is...
www.youtube.com

about an hour ago · Comment · Like · Share · Flag

Adam Gilfert likes this.

Adam Gilfert My name is Bo, fo' sho'... lol
4 minutes ago · Like

Write a comment...

Anthony Elonis Thanks Ryan Wrth, I'm now a fan of Bo!

Create an Ad

Need a Pick-Me-Up?
stumbleupon.com

Find the best stuff on the web with StumbleUpon, recommended just for you. Try it now!

Are you a Solitaire Whiz?

Try Arctic Tri Peak Solitaire for a new 3D challenge. Do you have what it takes to top the CafeHom leaderboards? Play now!

ACCO Everyday 1+ Chat (Offline)

344

Done

Start Facebook | Anthony ...

1:27 PM

GOVERNMENT EXHIBIT 15

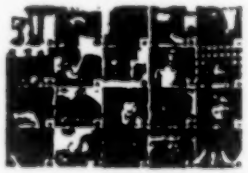
www.facebook.com

News Feed
Messages 3
Updates 1
Sent
Events 4
Friends 3

Dorney Park Crew
Create Group...
See All

Photos
Application Requests 3
More 9

Friends on Chat



Between You and Jill Matlack

Jill Matlack October 20 at 2:15pm Report

Hi Robifer. Talked to Josy last night about Anthony. A few of my clerks contacted me last night after he tagged them with his nasty Dorney letter. I told them to block him as a friend and report to FB. I am really concerned about his mental status. He not only lost his job, but has lost all contact with the people he considered to be his friends. Earlier this year he told Joey that he wanted to buy a gun and he has a list of Dorney employees to use it on. I hope that Dan Hall is aware that security needs to be looking out for him. Not just at employee entrances, but general admissions, too. He could have made a copy of a key (or just taken one from the property room) and can get in pretty much anywhere. I really think he needs professional help, but he has no family that would have him evaluated (or comitted!). Josy suggested that maybe you might want to talk to his wife about it. I am very worried about his interaction with his kids, too. I would like to see him get some help, so that he can move on in his life...Poor Amber must be terrified.

Rob Hill October 20 at 2:50pm

Hey Jill he definitely needs some professional help that is basically what he is doing right now he is crying out for help and attention but he is going about it the wrong way hurting a lot of people including me in this.. he made a comment in his letter about the people below mindy and keith have no values or shouldnt be past a ride operator.. i dont care if you want to criticize my supervision bc it doesnt matter what he thinks about it in the end its what managment thinks about it. but to say i have no values after i gave him a place to sleep at when things got rough with his family and a shoulder to cry on. and went to visit him when he was in the hospital and letting him hold my lil girl thats a low blow... i took great offence to his letter and actually its funny that your clerks were hurt by the letter bc they were smart enough and figured out it included them by his insulting words. He basically insulted the whole department. you me josy team leaders... he didnt mention names he didnt have too he brought the whole department into it.

Now do i still wanna help him yes bc i dont want to see any thing happen to him i dont want him to get hurt or killed and thats the path hes going down. i dont want to see him hurt or kill any one else either and its been eating me alive bc i cant figure out the right thing to do. i wanna talk to him but that could come back and bite me on the ass. i cant go to his wife

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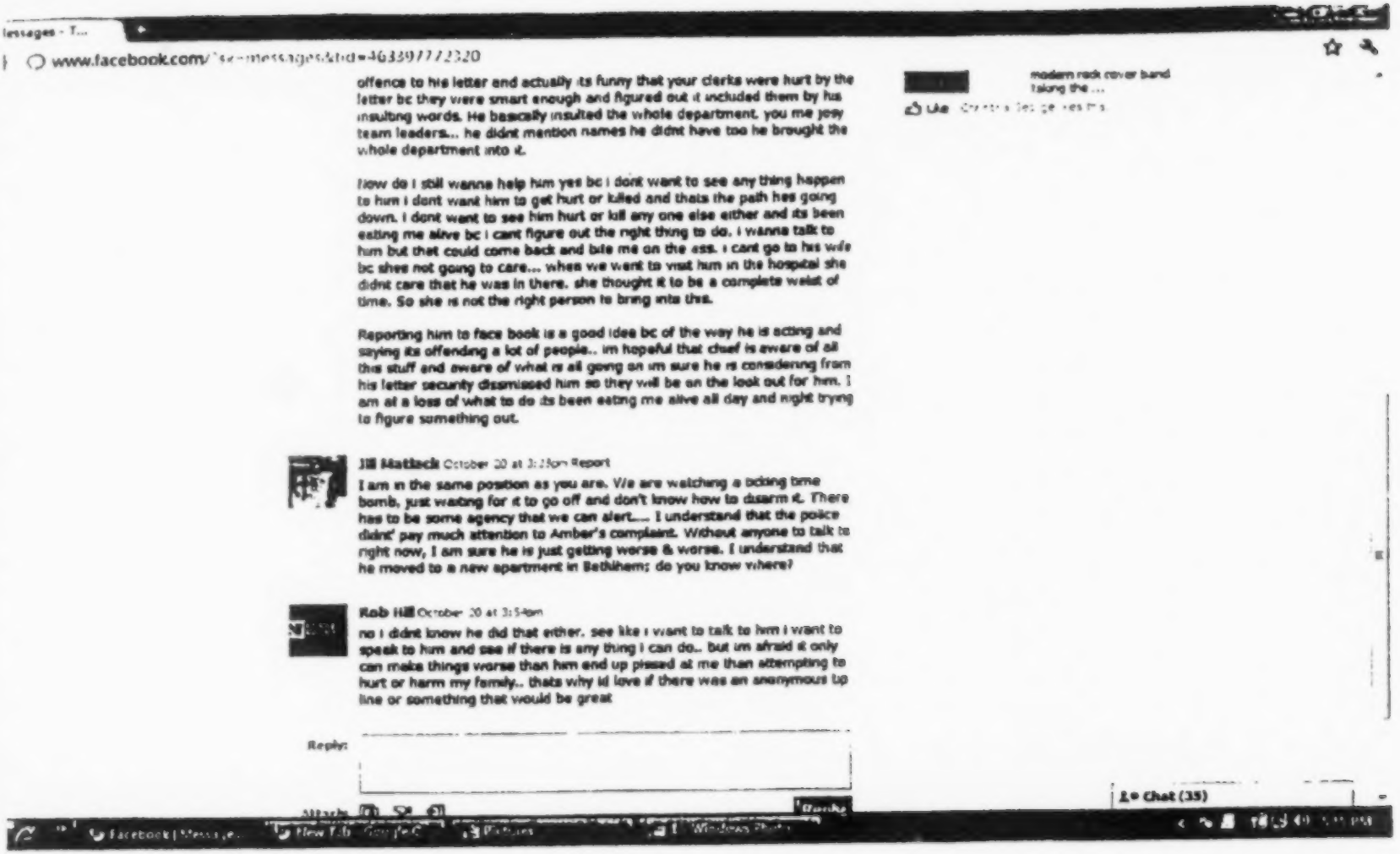
Chat (35)

GOVERNMENT EXHIBIT 252.



messages - T...

www.facebook.com/

offence to his letter and actually its funny that your clerks were hurt by the letter bc they were smart enough and figured out it included them by his insulting words. He basically insulted the whole department, you me jesy team leaders... he didnt mention names he didnt have too he brought the whole department into it.

Now do I still wanna help him yes bc I dont want to see any thing happen to him I dont want him to get hurt or killed and thats the path hes going down. I dont want to see him hurt or kill any one else either and its been eating me alive bc I cant figure out the right thing to do. I wanna talk to him but that could come back and bite me on the ass. I cant go to his wife bc shes not going to care... when we went to visit him in the hospital she didnt care that he was in there. she thought it to be a complete waist of time. So she is not the right person to bring into this.

Reporting him to face book is a good idea bc of the way he is acting and saying its offending a lot of people.. im hopeful that chief is aware of all this stuff and aware of what is all going on im sure he is considering from his letter security dismissed him so they will be on the look out for him. I am at a loss of what to do its been eating me alive all day and night trying to figure something out.

modern rock cover band taking the ...

Like

Jill Matlack October 20 at 3:28pm Report

I am in the same position as you are. We are watching a ticking time bomb, just waiting for it to go off and don't know how to disarm it. There has to be some agency that we can alert..... I understand that the police didnt' pay much attention to Amber's complaint. Without anyone to talk to right now, I am sure he is just getting worse & worse. I understand that he moved to a new apartment in Bethlehem; do you know where?

Rob Hill October 20 at 3:54pm

no I didnt know he did that either. see like I want to talk to him I want to speak to him and see if there is any thing I can do.. but im afraid it only can make things worse than him end up pissed at me than attempting to hurt or harm my family.. thats why id love if there was an anonymous tip line or something that would be great

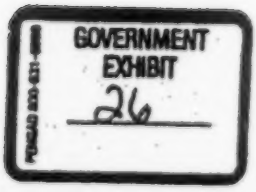
Reply

Chat (35)

GOVERNMENT EXHIBIT 25h

GOVERNMENT EXHIBIT

Posted 2010-10-23 15:14:03 UTC
Status (2/2) As far as I'm concerned, Phase One is complete. Cause ACLU, Facebook, and Dorney Park are all buzzwords for money and publicity.
Mobile



Posted 2010-10-23 15:13:52 UTC
Status (1/1) Sorry Corporal Negron of the South Whitehall PD. I don't talk to cops unless I'm under arrest after I have an attorney appointed by the County. But before you press any charges, you better think this out. Does Lehigh County know how expensive this case is gonna be? Cause I've got my sights set at the Federal level. I ain't a legitimate threat and I ain't gonna quit.

User Tone Dougie (100001408555814)
Text Well, you got this one all wrong because I actually got a hard on when I listened to the voicemail and it was South Whitehall. I love controversy bitch!
Time 2010-10-23 20:18:50 UTC

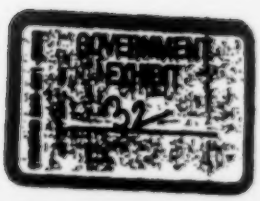
Posted 2010-11-04 18:40:51 UTC
Status Since I can't pen my own works, I'm going to let other artists do my dirty work. I may be the only man arrested for posting rap lyrics on facebook. Bring it! I have a feeling I'll be laughing all the way to the bank.
Mobile

Posted 2010-11-04 18:23:39 UTC
Status I have been officially censored by Berks County. I can no longer produce status updates featuring murder, rape, or violence without fear of being held in Contempt of Court. This is a severe violation of my First Amendment rights to Freedom of Speech. I have also lost custody of my children and the right to legally possess firearms. This is not the end. I do not quit. In fact, I'm lovin' it. I just miss my kids.
Mobile

Recipients Kevin P. Burns (330500007)
Tone Dougie (100001408555614)
Author Tone Dougie (100001408555614)
Sent 2010-10-22 01:28:04 UTC
Body If you couldn't tell, I'm on a mission against Cedar Fair. Fuck them mother fuckers!

Posted 2010-11-18 16:17:47 UTC
Status There's no order that prevents me from talking ABOUT my wife. The order only prevents me from contacting her. Which brings me to the first of many: Legal and Illegal Statements #1 Tara Louise is a dirty, filthy, cheating whore is a legal statement. Tell Tara Louise she's a dirty, filthy, cheating whore is an illegal statement.
Mobile://www.youtube.com/watch?v=dQv0-de5PFg&feature=related

Posted 2010-10-22 19:10:41 UTC
Status Revenge is a dish best served cold with a delicious side of psychological torture.
Mobile



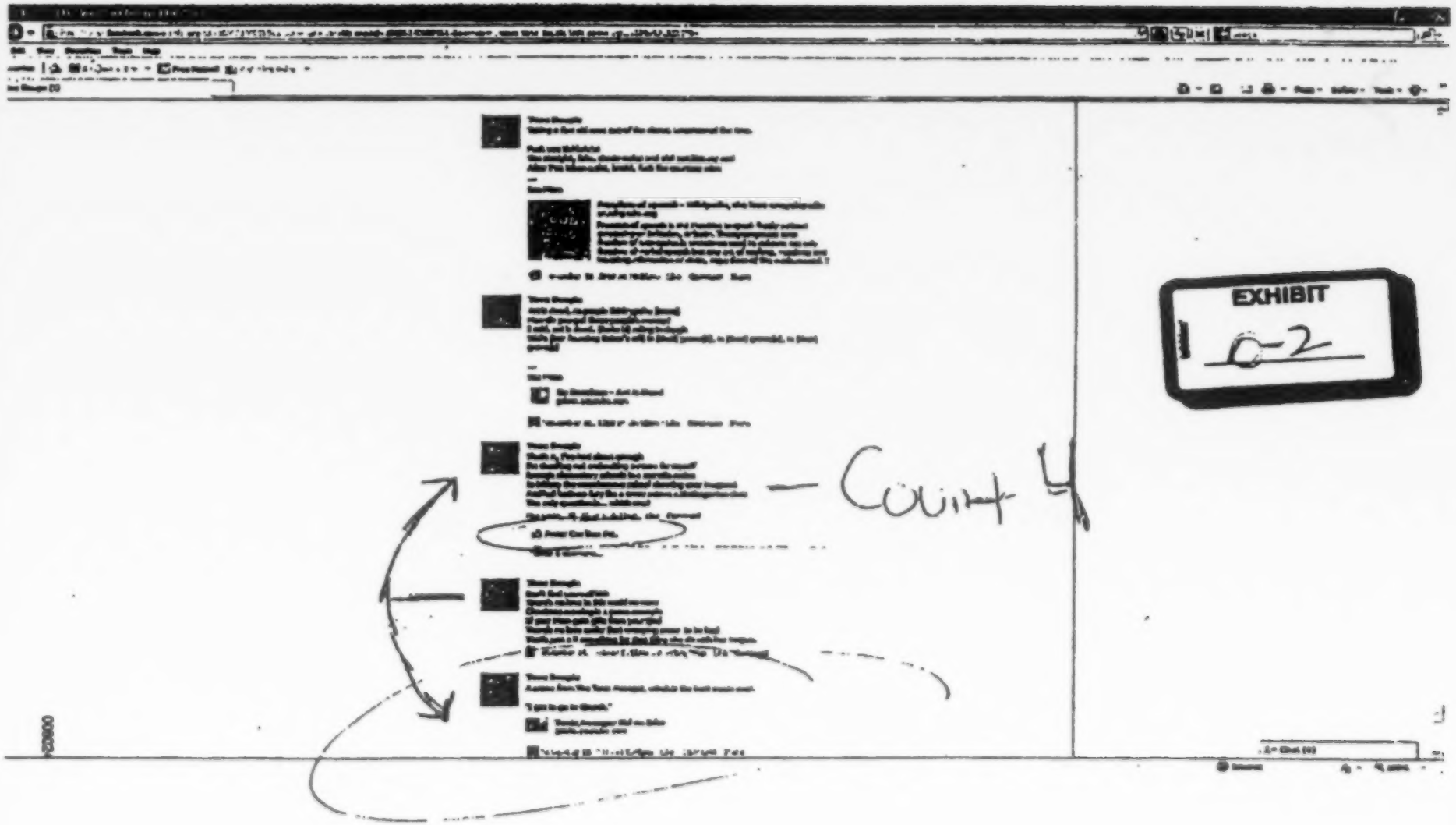


EXHIBIT
C-2
— Count 4

Text of Defense Exhibit 2

Tone Dougie
Taking a few old ones out of the closet, uncensored this time.

Fuck you Kohl sluts!
You straight, fake, shady moles and y'all can kiss my ass!
After I've taken a shit, bitch! fuck the courtesy wipe
...
See More

Freedom of speech – Wikipedia, the free encyclopedia
en.wikipedia.org
Freedom of speech is the freedom to speak freely without censorship or limitation, or both. The synonymous term freedom of expression is sometimes used to indicate not only freedom of verbal speech but any act of seeking, receiving and imparting information or ideas, regardless of the medium used.

November 16, 2010 at [illegible] Like Comment Share

Tone Dougie
Art is dead, so people think you're [crazy]
How do you get those people's money?
I said art is dead [Berks is] rolling in dough
While [our founding fathers] roll in their grave[s], in their grave[s],
In their grave[s]
...

See more

Bo Burnham – Art is dead
gdata.youtube.com

November 16, 2010 at [illegible] Like Comment Share

Tone Dougie
That's it, I've had about enough
I'm checking out and making a name for myself
Enough elementary schools in a ten mile radius
To initiate the most heinous school shooting ever imagined

And hell hath no fury like a crazy man in a kindergarten class
The only question is...which one?
November 16, 2010 at 9:18 am Like Comment

[thumbs up symbol] Pieter Cos likes this.

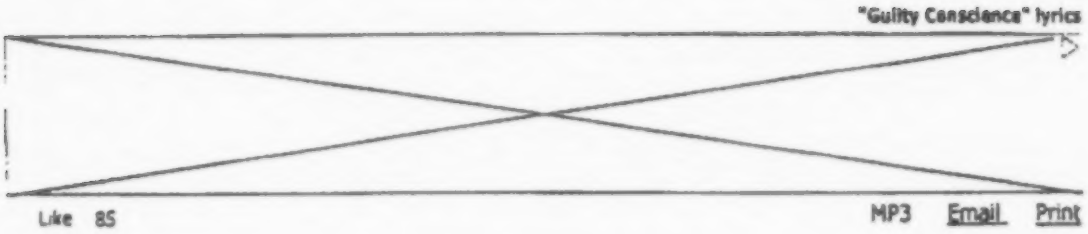
Tone Dougie
Don't fool yourself, kids
There's no love in this world no more
Christmas morning is a prime example
If your Mom gets gifts from your Dad
There's no love under that wrapping paper to be had
That's just a little something for that thing she do with her tongue

Tone Dougie
A scene from Toxic Avenger, which is the best movie ever.

"I got to go to Church."

Toxic Avenger Kid on Bike.
gdata.youtube.com

November 15, 2010 at [illegibile] Like Comment Share



EMINEM - Guilty Conscience

EMINEM LYRICS

Send "Guilty Conscience" Ringtone to your Cell

"Guilty Conscience"
(feat. Dr. Dre)

[sound of static]

[announcer]
Meet Eddie, twenty-three years old.
Fed up with life and the way things are going,
he decides to rob a liquor store.
("I can't take this no more, I can't take it no more homes")
But on his way in, he has a sudden change of heart.
And suddenly, his conscience comes into play...
("Shit is mine, I gotta do this.. gotta do this")

[Dr. Dre]
Alright, stop! (Huh?)
Now before you walk in the door of this liquor store
and try to get money out the drawer
You better think of the consequence (But who are you?)
I'm your motherfuckin conscience

[Eminem]
That's nonsense!
Go in and gaffle the money and run to one of your aunt's cribs
And borrow a damn dress, and one of her blonde wigs
Tell her you need a place to stay
You'll be safe for days if you shave your legs with Renee's razor blade

[Dr. Dre]
Yeah but if it all goes through like it's supposed to
The whole neighborhood knows you and they'll expose you
Think about it before you walk in the door first
Look at the store clerk, she's older than George Burns

[Eminem]
Fuck that! Do that shit! Shoot that bitch!
Can you afford to blow this shit? Are you that rich?
Why you give a fuck if she dies? Are you that bitch?
Do you really think she gives a fuck if you have kids?

[Dr. Dre]

EXHIBIT

Man, don't do it, it's not worth it to risk it! (You're right!)
Not over this shit (Stop!) Drop the biscuit (I will!)
Don't even listen to Slim yo, he's bad for you
(You know what Dre? I don't like your attitude..)

[sound of static]

("It's alright c'mon, just come in here for a minute")
("Mmm, I don't know!")
("Look baby..")
("Damn!")
("Yo, it's gonna be alright, right?")
("Well OK..")

[announcer]
Meet Stan, twenty-one years old. ("Give me a kiss!")
After meeting a young girl at a rave party,
things start getting hot and heavy in an upstairs bedroom.
Once again, his conscience comes into play... ("Shit!")

[Eminem]
Now listen to me, while you're kissin her cheek
and smearin her lipstick, I slipped this in her drink
Now all you gotta do is nibble on this little bitch's earlobe..
(Yo! This girl's only fifteen years old
You shouldn't take advantage of her, that's not fair)
Yo, look at her bush.. does it got hair? (Uh huh!)
Fuck this bitch right here on the spot bare
Til she passes out and she forgot how she got there
(Man, ain't you ever seen that one movie _Kids_?)
No, but I seen the porno with SunDoobiest!
(Shit, you wanna get hauled off to jail?)
Man fuck that, hit that shit raw dawg and bail..

[sound of static]
[pickup idling, radio playing]

[announcer]
Meet Grady, a twenty-nine year old construction worker.
After coming home from a hard day's work,
he walks in the door of his trailer park home
to find his wife in bed with another man.
("WHAT THE FUCK?!?!")
("Grady!!")

[Dr. Dre]
Alright calm down, relax, start breathin..

[Eminem]
Fuck that shit, you just caught this bitch cheatin
While you at work she's with some dude tryin to get off?!
FUCK slittin her throat, CUT THIS BITCH'S HEAD OFF!!!

[Dr. Dre]
Wait! What if there's an explanation for this shit?
(What? She tripped? Fell? Landed on his dick?!)
Alright Shady, maybe he's right Grady
But think about the baby before you get all crazy

[Eminem]
Okay! Thought about it, still wanna stab her?

Grab her by the throat, get your daughter and kidnap her?
That's what I did, be smart, don't be a retard
You gonna take advice from somebody who slapped DEE BARNES??!

[Dr. Dre]
What'chu say? (What's wrong? Didn't think I'd remember?)
I'ma kill you motherfucker!

[Eminem]
Uhhh-aahh! Temper temper!
Mr. Dre? Mr. N.W.A.?
Mr. AK comin' straight outta Compton y'all better make way?
How in the fuck you gonna tell this man not to be violent?

[Dr. Dre]
Cause he don't need to go the same route that I went
Been there, done that.. aw fuck it...
What am I sayin? Shoot em both Grady, where's your gun at?

[gun fires, is cocked, and re-fired]

Thanks to thunder__lighting_, Laker_Lover_3408 for correcting these lyrics.

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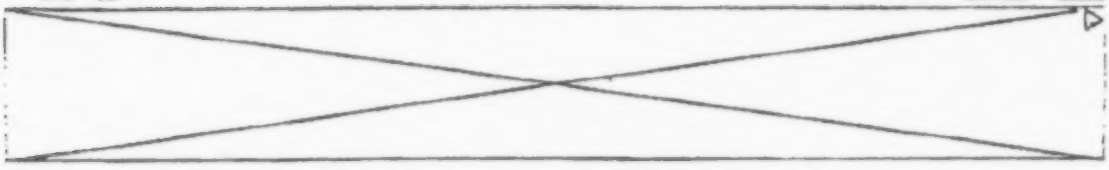

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"Kill You" lyrics

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EMINEM - Kill You

EMINEM LYRICS

Send "Kill You" Ringtone to your Cell

"Kill You"

[Eminem]
When I was just a little baby boy,
my momma used to tell me these crazy things
She used to tell me my daddy was an evil man,
she used to tell me he hated me
But then I got a little bit older
and I realized, she was the crazy one
But there was nothing I could do or say to try to change it
cause that's just the way she was

They said I can't rap about being broke no more
They ain't say I can't rap about coke no more
(AH!) Slut, you think I won't choke no whore
'til the vocal cords don't work in her throat no more?!
(AH!) These motherfuckers are thinking I'm playing
Thinking I'm saying the shit cause I'm thinking it just to be saying it
(AH!) Put your hands down bitch, I ain't gonna shoot you
I'ma pull +YOU+ to this bullet, and put it through you
(AH!) Shut up slut, you're causing too much chaos
Just bend over and take it like a slut, OK Ma?
"Oh, now he's raping his own mother, abusing a whore,
snorting coke, and we gave him the Rolling Stone cover?"
You god damn right BITCH, and now it's too late
I'm triple platinum and tragedies happen in two states
I invented violence, you vile venomous volatile bitches
vain Vicadin, vrinnn Vrinnn, VRINNN! *[*chainsaw revs up*]*
Texas Chainsaw, left his brains all
dangling from his neck, while his head barely hangs on
Blood, guts, guns, cuts
Knives, lives, wives, nuns, sluts

[Chorus: Eminem]

Bitch I'ma kill you! You don't wanna fuck with me
Girls neither - you ain't nothing but a slut to me
Bitch I'ma kill you! You ain't got the balls to beef
We ain't gonna never stop beefing I don't squash the beef
You better kill me! I'ma be another rapper dead
for popping off at the mouth with shit I shouldn't said

EXHIBIT D-8

But when they kill me - I'm bringing the world with me
Bitches too! You ain't nothing but a girl to me
.. I said you don't, wanna fuck with Shady (cause why?)
Cause Shady, will fucking kill you (ah-ha ha)
I said you don't, wanna fuck with Shady (why?)
Cause Shady, will fucking kill you..

[Eminem]
Bitch I'ma kill you! Like a murder weapon, I'ma conceal you
in a closet with mildew, sheets, pillows and film you
Buck with me, I been through hell, shut the hell up!
I'm trying to develop these pictures of the Devil to sell 'em
I ain't "acid rap," but I rap on acid
Got a new blow-up doll and just had a strap-on added
WHOOPS! Is that a subliminal hint? NO!
Just criminal intent to sodomize women again
Eminem offend? NO! Eminem insult
And if you ever give in to him, you give him an impulse
to do it again, THEN, if he does it again
you'll probably end up jumping out of something up on the 10th
(Ah!) Bitch I'ma kill you, I ain't done this ain't the chorus
I ain't even drug you in the woods yet to paint the forest
A bloodstain is orange after you wash it three or four times
in a tub but that's normal ain't it Norman?
Serial killer hiding murder material
in a cereal box on top of your stereo
Here we go again, we're out of our medicine
out of our minds, and we want in yours, let us in

[Chorus (first line starts "Or I'ma kill you!")]

[Eminem]
Eh-heh, know why I say these things?
Cause lady's screams keep creeping in Shady's dreams
And the way things seem, I shouldn't have to pay these shrinks
this eighty G's a week to say the same things TWEECE!
TWICE? Whatever, I hate these things
Fuck shots! I hope the weed'll outweigh these drinks
Motherfuckers want me to come on their radio shows
just to argue with 'em cause their ratings stink?
FUCK THAT! I'll choke radio announcer to bouncer
from fat bitch to off seventy-thousand pounds of her
from principal to the student body and counselor
from in-school to before school to out of school
I don't even believe in breathing I'm leaving air in your lungs
just to hear you keep screaming for me to seep it
OK, I'M READY TO GO PLAY
I GOT THE MACHETE FROM O.J.
I'M READY TO MAKE EVERYONE'S THROAT ACHE
You faggots keep egging me on
'til I have you at knifepoint, then you beg me to stop?
SHUT UP! Give me your hands and feet
I said SHUT UP when I'm talking to you
YOU HEAR ME? ANSWER ME!

[Chorus]
[first line starts "Or I'ma kill you!", ninth line starts "Bitch I'ma kill you!"]

[Eminem]
Ha ha, I'm just playing ladies
You know I love you

Thanks to naive01, Imran Hamdad, Ray for correcting these lyrics.

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"Criminal" lyrics

What do you love? monkeys
from Google

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EMINEM - Criminal

EMINEM LYRICS

Send "Criminal" Ringtone to your Cell

"Criminal"

[Eminem]
A lot of people ask me.. stupid fucking questions
A lot of people think that.. what I say on records
or what I talk about on a record, that I actually do in real life
or that I believe in it
Or if I say that, I wanna kill somebody, that..
I'm actually gonna do it
or that I believe in it
Well, shit.. if you believe that
then I'll kill you
You know why?
Cause I'm a

CRIMINAL
CRIMINAL
You god damn right
I'm a CRIMINAL
Yeah, I'm a CRIMINAL

[Eminem]
My words are like a dagger with a jagged edge
That'll stab you in the head
whether you're a fag or lez
Or the homosex, hermaph or a trans-a-vest
Pants or dress - hate fags? The answer's "yes"
Homophobic? Nah, you're just heterophobic
Staring at my jeans, watching my genitals bulging (Ooh!)
That's my motherfucking balls, you'd better let go of em
They belong in my scrotum, you'll never get hold of em
Hey, it's me, Versace
Whoops, somebody shot me!
And I was just checking the mail
Get it? Checking the 'male'?
How many records you expecting to sell
after your second LP sends you directly to jail?
C'mon!-- Relax guy, I like gay men
Right, Ken? Give me an amen (AAA-men!)
Please Lord, this boy needs Jesus
Heal this child, help us destroy these demons

EXHIBIT D-9

Oh, and please send me a brand new car
And a prostitute while my wife's sick in the hospital
Preacher preacher, fifth grade teacher
You can't reach me, my mom can't neither
You can't teach me a goddamn thing cause
I watch TV, and Comcast cable
and you ain't able to stop these thoughts
You can't stop me from topping these charts
And you can't stop me from dropping each March
with a brand new CD for these fucking retards
Duhhh, and to think, it's just little ol' me
Mr. "Don't Give A Fuck," still won't leave

[Chorus: Eminem (repeat 2X)]

I'm a CRIMINAL
Cause every time I write a rhyme, these people think it's a crime
to tell em what's on my mind - I guess I'm a CRIMINAL
but I don't gotta say a word, I just flip em the bird
and keep going, I don't take shit from no one

[Eminem]
My mother did drugs - hard-liquor, cigarettes, and speed
The baby came out - disfigured, ligaments indeed
It was a seed who would grow up just as crazy as she
Don't dare make fun of that baby cause that baby was me
I'm a CRIMINAL - an animal caged who turned crazed
But how the fuck you supposed to grow up when you weren't raised?
So as I got older and I got a lot taller
My dick shrunk smaller, but my balls got larger
I drink more liquor to fuck you up quicker
than you'd wanna fuck me up for saying the word ...
My morals went thhbbpp when the president got oral
Sex in his Oval Office on top of his desk
Off of his own employee
Now don't ignore me, you won't avoid me
You can't miss me, I'm white, blonde-haired
and my nose is pointy
I'm the bad guy who makes fun of people that die
in plane crashes and laughs
As long as it ain't happened to him
Slim Shady, I'm as crazy as Em
-inem and Kim combined - *[*kch*]* the maniac's in
Replacing the doctor cause Dre couldn't make it today
He's a little under the weather, so I'm taking his place
(Mm-mm-mmm!) Oh, that's Dre with an AK to his face
Don't make me kill him too and spray his brains all over the place
I told you Dre, you should've kept that thang put away
I guess that'll teach you not to let me play with it, eh?
I'm a CRIMINAL

[Interlude Skit]
Aight look (uh huh) just go up in that motherfucker
get the motherfucking money and get the fuck up outta there
[Em] Aight
I'll be right here waiting on you
[Em] Aight
Yo Em
[Em] What?!
Don't kill nobody this time
[Em] Awwright... god damn, fuck...

(whistling) how you doin'?
[Teller] HI, how can I help you?
[Eminem] Yeah I need to make a withdrawl
[Teller] Okay
[Eminem] Put the fucking money in the bag bitch
and I won't kill you!
[Teller] What? Oh my god, don't kill me
[Eminem] I'm not gonna kill you bitch, quit looking around...
[Teller] Don't kill me, please don't kill me...
[Eminem] I said I'm not gonna fucking kill you
Hurry the fuck up! *[*BOOM*]* Thank you!

[Eminem]
Windows tinted on my ride when I drive in it
So when I rob a bank, run out and just dive in it
So I'll be disguised in it
And if anybody identifies the guy in it
I'll hide for five minutes
Come back, shoot the eyewitness
Fire at the private eye hired to pry in my business
Die, bitches, bastards, brats, pets
This puppy's lucky I didn't blast his ass yet *[*dog whines*]*
If I ever gave a fuck, I'd shave my nuts
tuck my dick in between my legs and cluck
You motherfucking chickens ain't brave enough
to say the stuff I say, so just tape it shut *[*tape unrolls*]*
Shit, half the shit I say, I just make it up
To make you mad so kiss my white naked ass
And if it's not a rapper that I make it as
I'ma be a fucking rapist in a Jason mask

[Chorus 2X]

Thanks to kevin.toner, Zackreiter12, third_eye_open13 for correcting these lyrics.

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"'97 Bonnie and Clyde" lyrics
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EMINEM - '97 Bonnie and

EMINEM LYRICS

Send "'97 Bonnie and Clyde" Ringtone to your Cell

"'97 Bonnie and Clyde"

Just the two of us.. *[8X]*

[Eminem]
Baby your da-da loves you (hey)
And I'ma always be here for you (hey) no matter what happens
You're all I got in this world
I would never give you up for nothin
Nobody in this world is ever gonna keep you from me
I love you

C'mon Hai-Hai, we goin to the beach
Grab a couple of toys and let da-da strap you in the car seat
Oh where's mama? She's takin a little nap in the trunk
Oh that smell (whew!) da-da musta runned over a skunk
Now I know what you're thinkin - it's kind of late to go swimmin
But you know your mama, she's one of those type of women
that do crazy things, and if she don't get her way, she'll throw a fit
Don't play with da-da's toy knife, honey, let go of it (no!)
And don't look so upset, why you actin bashful?
Don't you wanna help da-da build a sand castle? (yeah!)
And mama said she wants to show how far she can float
And don't worry about that little boo-boo on her throat
It's just a little scratch - it don't hurt, her was eatin
dinner while you were sweepin and spilled ketchup on her shirt
Mama's messy isn't she? We'll let her wash off in the water
and me and you can pway by ourselves, can't we?

Just the two of us.. *[2X]*
And when we ride!
Just the two of us.. *[2X]*
Just you and I!
Just the two of us.. *[2X]*
And when we ride!
Just the two of us.. *[2X]*
Just you and I!

See honey.. there's a place called heaven and a place called hell
A place called prison and a place called jail
And da-da's probably on his way to all of em except one
Cause mama's got a new husband and a stepson
And you don't want a brother do ya? (Nah)
Maybe when you're old enough to understand a little better
I'll explain it to ya
But for now we'll just say mama was real real bad
She was bein mean to dad and made him real real mad

EXHIBIT
D-10

But I still feel sad that I put her on time-out
Sit back in your chair honey, quit tryin to climb out (WAHH!)
I told you it's okay HaiHai, wanna ba-ba?
Take a night-night? Nan-a-boo, goo-goo ga-ga?
Her make goo-goo ca-ca? Da-da change your dia-dee
Clean the baby up so her can take a nighty-nighty
Your dad'll wake her up as soon as we get to the water
Ninety-seven Bonnie and Clyde, me and my daughter

Just the two of us.. *[2X]*
And when we ride!
Just the two of us.. *[2X]*
Just you and I!
Just the two of us.. *[2X]*
And when we ride!
Just the two of us.. *[2X]*
Just you and I!

Wake up sweepy head we're here, before we pway
we're gonna take mama for a wittle walk along the pier
Baby, don't cry honey, don't get the wrong idea
Mama's too sweepy to hear you screamin in her ear (ma-maa!)
That's why you can't get her to waka, but don't worry
Da-da made a nice bed for mommy at the bottom of the lake
Here, you wanna help da-da tie a rope around this rock? (yeah!)
We'll tie it to her footsie then we'll roll her off the dock
Ready now, here we go, on the count of free..
One.. two.. free.. WHEEEEEE! (whoooooshhhhh)
There goes mama, spwashin in the wa-ta
No more fightin wit dad, no more restraining order
No more step-da-da, no more new brother
Blow her kisses bye-bye, tell mama you love her (mommy!)
Now we'll go play in the sand, build a castle and junk
But first, just help dad with two more things out the trunk

Just the two of us.. *[2X]*
And when we ride!
Just the two of us.. *[2X]*
Just you and I!
Just the two of us.. *[2X]*
And when we ride!
Just the two of us.. *[2X]*
Just you and I!

Just the two of us.. *[4X]*

[Eminem]
Just me and you baby
is all we need in this world
Just me and you
Your da-da will always be there for you
Your da-da's always gonna love you
Remember that
If you ever need me I will always be here for you
If you ever need anything, just ASK
Da-da will be right there
Your da-da loves you
I love you baby

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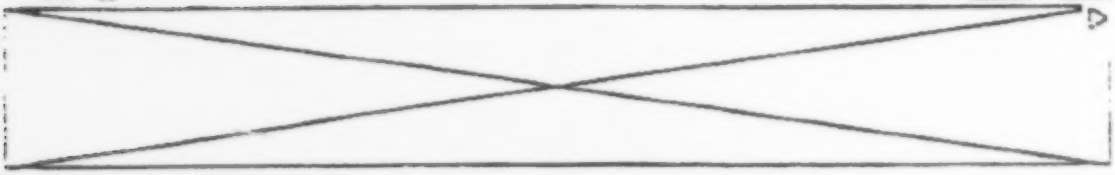

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PETITIONER'S BRIEF

No. 13-983

In the Supreme Court of the United States

ANTHONY D. ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Fl.
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

JOHN P. ELWOOD
Counsel of Record
RALPH C. MAYRELL
DMITRY SLAVIN
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

CONOR MCEVILY
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002
(713) 758-2222

QUESTIONS PRESENTED

It is a federal crime to "transmit[] in interstate or foreign commerce any communication containing * * * any threat to injure the person of another," 18 U.S.C. § 875(c). The questions presented are:

1. Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

2. Whether, consistent with the First Amendment and *Virginia* v. *Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten; or whether it is enough to show that a "reasonable person" would regard the statement as threatening.

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Ashcroft v. *ACLU*, 542 U.S. 656 (2004).....35

Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002).....58, 60

Brandenburg v. *Ohio*, 395 U.S. 444 (1969) (per curiam).....39, 40

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973).....61

Butler v. *Michigan*, 352 U.S. 380 (1957).....58

Carter v. *United States*, 530 U.S. 255 (2000).....34

Cohen v. *California*, 403 U.S. 15 (1971) 55, 60

Consol. Rail. Corp. v. *Gottshall*, 512 U.S. 532 (1994) 32

Dun & Bradstreet, Inc. v. *Greenmoss Builders*, 472 U.S. 749 (1985) 42

Easton Area Sch. Dist. v. *B.H.*, 134 S. Ct. 1515 (2014) 13

Forsyth Cnty., Ga. v. *Nationalist Movement*, 505 U.S. 123 (1992) 48

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 41

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 41, 42

Hess v. *Indiana*, 414 U.S. 105 (1973) (per curiam) 39

Illinois ex rel. Madigan v. *Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003) 21, 42, 46

Liparota v. *United States*, 471 U.S. 419 (1985) 27, 28, 34

Cases—Continued: **Page(s)**

Morissette v. *United States*, 342 U.S. 246 (1952) 26, 28, 30

NAACP v. *Button*, 371 U.S. 415 (1963) 4, 41, 46

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 35, 40, 46

N.Y. Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 3, 41

Norris v. *State*, 95 Ind. 73 (1884) 38

Planned Parenthood of the Columbia/ Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc) 32

Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994) 29

Reno v. *ACLU*, 521 U.S. 844, 872 (1997) 3, 45, 48

Riley v. *California*, 134 S. Ct. 2473 (2014) 59

Riley v. *Nat'l Federation of the Blind*, 487 U.S. 781 (1988) 48

Rogers v. *United States*, 422 U.S. 35 (1975) 3, 4, 31, 46

Sandifer v. *U.S. Steel Corp.*, 134 S. Ct. 870 (2014) 23

Seeber v. *United States*, 329 F.2d 572 (9th Cir. 1964) 25, 26

Snyder v. *Phelps*, 131 S. Ct. 1207 (2011) 13, 60

Staples v. *United States*, 511 U.S. 600 (1994) 26, 27, 28, 30

State v. *Benedict*, 11 Vt. 236 (1839) 20, 21, 37

Cases—Continued: **Page(s)**

State v. *Skinner*, No. A-57/58-12 (N.J. Aug. 4, 2014) 55

Texas v. *Johnson*, 491 U.S. 397 (1989) 34

Thompson v. *Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928 (D. Nev. June 30, 2012).....6

United States v. *Alvarez*, 132 S. Ct. 2537 (2012) .....*passim*

United States v. *Bailey*, 444 U.S. 394 (1980).....30

United States v. *Bozeman*, 495 F.2d 508 (5th Cir. 1974).....25, 26

United States v. *Cassel*, 408 F.3d 622 (9th Cir. 2005) 45

United States v. *Dutsch*, 357 F.2d 331 (4th Cir. 1966) 20, 25

United States v. *Eichman*, 496 U.S. 310 (1990) 58

United States v. *Fulmer*, 108 F.3d 1486, 1490 (1st Cir. 1997).....51

United States v. *Granderson*, 511 U.S. 39 (1994).....32

United States v. *Jeffries*, 692 F.3d 473 (6th Cir. 2012), cert. denied, 134 S. Ct. 59 (2013).....*passim*

United States v. *Kelner*, 534 F.2d 1020 (2d Cir. 1976) 25

United States v. *Kosma*, 951 F.3d 549 (3d Cir. 1991) 3, 17, 19

United States v. *LeVison*, 418 F.2d 624 (9th Cir. 1969) 25, 26

Cases—Continued: **Page(s)**

United States v. *Playboy Entm't Grp.*, 529 U.S. 803 (2000) 59

United States v. *Stevens*, 559 U.S. 460 (2010) .....*passim*

United States v. *Twine*, 853 F.2d 676 (9th Cir. 1988) 26

United States v. *U.S. Gypsum Co.*, 438 U.S. 422 (1978) .....*passim*

United States v. *White*, 670 F.3d 498 (4th Cir. 2012) 31

United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) .....*passim*

Virginia v. *Black*, 538 U.S. 343 (2003).....*passim*

Ware v. *Loveridge*, 42 N.W. 997 (Mich. 1889).....37

Watts v. *United States*, 394 U.S. 705 (1969) (per curiam).....35, 36

Statutes:

Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649.....24

Pub. L. No. 76-76, 53 Stat. 742 (1939).....25

7 U.S.C. § 2024(b)(1) 34

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18 U.S.C. § 871(a).....19, 35

18 U.S.C. § 875(b).....33

18 U.S.C. § 875(c) .....*passim*

Statutes—Continued: **Page(s)**

18 U.S.C. § 875(d) 33

18 U.S.C. § 876 24

26 U.S.C. § 5861(d) 28

28 U.S.C. § 1254(1) 1

Kan. Stat. Ann. § 21-6103(a)(1) 42

N.H. Rev. Stat. Ann. § 644:11 42

Utah Code Ann. § 76-9-404 42

Va. Code Ann. § 18.2-209 42

Va. Code Ann. § 18.2-423 44

Miscellaneous:

25 *The American & English Encyclopaedia of Law* (Charles F. Williams ed., 1894) 36, 37, 38

Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 227 (2d ed. 1858) 27

2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 1201 (6th ed. 1877) 37, 38

2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 1173 (6th ed. 1877) 37

Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 975 (1866) 38

Black's Law Dictionary (8th ed. 2004) 23

Blackstone's Commentaries 27

Body Count, *Cop Killer*, *on* Body Count (Sire 1992) 55

Miscellaneous—Continued: **Page(s)**

David Browne: *The Slim Shady LP*, Entertainment Weekly, Mar. 12, 1999, http://goo.gl/Os5c3M.....56

Case Comment, *United States* v. *Jeffries*, 126 Harv. L. Rev. 1138 (2012).....46

Guy Davis, *Long As You Get It Done*, *on* Legacy (Red House 2004).....53

John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries*, 10 Hastings Comm. & Ent. L.J. 969 (1988).....39

Dixie Chicks, *Goodbye Earl*, *on* Fly (Sony 1999).....54

Drowning Pool, *Bodies*, *on* Sinner (Wind Up 2001).....55

Bob Dylan, *Someday Baby*, *on* Modern Times (Columbia 2006).....53

Adam Edelman & Joseph Straw, *New York Rep. Michael Grimm threatens reporter after being asked about fundraising allegations*, N.Y. Daily News, Jan. 23, 2014, http://goo.gl/xjzgvh.....49

Eminem, *97 Bonnie and Clyde*, *on* The Slim Shady LP (Interscope 1999).....55

Eminem, *Kim*, *on* The Marshall Mathers LP (Interscope 2000).....54

Eminem, *I'm Back*, *on* The Marshall Mathers LP (Interscope 2000).....14

Miscellaneous—Continued: **Page(s)**

Exchange Between Bob Woodward and White House Official in Spotlight, CNN Politics (Feb. 27, 2013), http://goo.gl/K3QZkR. 50

Kevin Gates, *Posed to Be in Love*, *on* By Any Means (Atlantic 2014).....54

Green Day, *Platypus (I Hate You)*, *on* Nimrod (Reprise 1997).....53

Judith Evans Grubbs, *Stigmata Aeterna: A Husband's Curse*, *in* Vertis in Usum: Studies in Honor of Edward Courtney (2002) 53

Guns 'n' Roses, *Used to Love Her*, *on* Lies (Geffen 1988) 53

Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 Geo. L.J. 633 (2003).....47

Oliver Wendell Holmes, *The Common Law* (Little, Brown & Co. 1909) 46

Lightnin' Hopkins, *Shotgun Blues* (Aladdin 1950) 53

Is that a threat?, TV Tropes, http://goo.gl/qwzirC 24

Skip James, *.22-20 Blues* (Paramount 1931).....53

Brian Kennan, *Evolutionary Biology and Strict Liability for Rape*, 22 Law & Psychol. Rev. 131 (1998) 47

Jennifer Kromberg, *The 5 Stages of Grieving the End of a Relationship*, Psych. Today, Sept. 11, 2013, http://goo.gl/gxEX3t.....53

Miscellaneous—Continued: **Page(s)**

Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?*, 89 J. Personality & Soc. Psychol. 925 (2005). 50

Miranda Lambert, *Gunpowder and Lead*, on Crazy Ex-Girlfriend (Columbia 2007) 54

Kyle A. Mabe, Note, *Long Live the King:* United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 Golden Gate U. L. Rev. 51 (2013).....50

Model Penal Code (1980)

§ 2.02 cmt. 2 27

§ 211.1 cmt. 1 37

§ 211.3 38

§ 212.5 cmt. 1 37

§ 212.5 cmt. 2 .....38, 46

Org. for Sec. & Coop. in Europe, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve* 172 (2005), http://goo.gl/A27xBi 41

11 *Oxford English Dictionary* (1st ed. 1933) 23

Restatement (Second) of Torts § 46 cmt. D (1965) 33

2 Restatement (Third) of the Law of Torts Liability for Physical & Emotional Harm § 46 (2012) 33, 60

Robert J. Rhee, *Tort Arbitrage*, 60 Fla. L. Rev. 125 (2008) 47

Miscellaneous—Continued: **Page(s)**

Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283 (2001) 32, 51

Ian Savage, *Demographic Influences on Risk Perceptions*, 13 Risk Analysis 413 (1993).....47

Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197 45

Threatening Communications: Hearing on H.R. 3230 Before the H. Comm. on the Post Office & Post Roads, 76th Cong. (1939) 24, 25

E.A. Vander Veer, *Facebook: The Missing Manual* (2008), *available at* http://goo.gl/UFlK3l.....5

Webster's New Int'l Dictionary (2d ed. 1954) 23

2 Francis Wharton, *Criminal Law & Proc.* § 803 (Ronald A. Anderson ed., 12th ed. 1957).....36, 37

Whitest Kids U' Know, *It's Illegal to Say . . .*, http://goo.gl/lDLhN4.....12

In the Supreme Court of the United States

ANTHONY D. ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-29a, is reported at 730 F.3d 321. The opinion of the district court denying petitioner's post-trial motions, Pet. App. 30a-48a, is reported at 897 F. Supp. 2d 335. The opinion of the district court denying petitioner's motion to dismiss, Pet. App. 49a-60a, is unreported, but available at 2011 WL 5024284.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2013, and a timely petition for panel rehearing and rehearing en banc was denied on October 17, 2013. On January 6, 2014, Justice Alito extended the time for filing a petition for a writ of certiorari to February 14, 2014, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 16, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 875(c) of Title 18 of the United States Code provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

Other relevant statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a.

STATEMENT

Petitioner stands convicted of violating 18 U.S.C. § 875(c), prohibiting the interstate transmission of "any communication containing * * * any threat to injure the person of another," 18 U.S.C. § 875(c). During petitioner's trial, it was settled law in the Third Circuit that whether the defendant *intended* to threaten someone was irrelevant: As the government explained, "it doesn't matter what he thinks." J.A.286. All that mattered was whether "the defendant intentionally ma[d]e a statement * * * under such

circumstances wherein a reasonable person would foresee that the statement would be interpreted" as a threat. Pet. App. 12a (quoting *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991)). At the government's urging, the district court rejected petitioner's requests that the question of his intent to threaten be put to the jury.

Under the Third Circuit's objective construction, Section 875(c) implicates two types of speech restrictions that this Court has said pose particular risks to free expression. First, this Court has identified criminal prohibitions on pure speech as "matter[s] of special concern" under the First Amendment because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno* v. *ACLU*, 521 U.S. 844, 871-872 (1997). The mere "threat of criminal prosecution * * * can inhibit the speaker from making [lawful] statements," thereby chilling "speech that lies at the First Amendment's heart." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

Second, this Court has held that "negligence * * * is [a] constitutionally insufficient" standard for imposing liability for speech. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 288 (1964). And as Justice Marshall explained, "[i]n essence, the objective [threat] interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Rogers* v. *United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring); accord *United States* v.

Jeffries, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*) (test "reduces culpability * * * to negligence"), cert. denied, 134 S. Ct. 59 (2013). "Because First Amendment freedoms need breathing space to survive," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), a standard that punishes a speaker for negligently *failing to foresee* how listeners would perceive his statements, irrespective of his intent in speaking, would deter a broad array of protected expression.

A standard that is disfavored even for civil penalties is intolerable as a basis for imposing criminal punishment on pure speech, "discouraging the 'uninhibited, robust, and wide-open' debate that the First amendment is intended to protect." *Rogers*, 422 U.S. at 47-48 (Marshall, J., concurring). Consistent with that understanding, this Court held in *Virginia* v. *Black*, 538 U.S. 343 (2003), that constitutionally unprotected "true threats" are "those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence" on someone. *Id.* at 359 (emphasis added). If Section 875(c) imposes criminal liability for negligently failing to anticipate that remarks would be seen as threats, its application to petitioner violated the First Amendment.

But the Court need not reach the constitutionality of the Third Circuit's strained "objective" interpretation of Section 875(c). Straightforward principles of statutory construction compel the conclusion that the provision prohibits only *intentional* threats, consistent with the ordinary meaning of "threat," see p. 23, *infra*, and the presumption that Congress "legis-

lated against the background of our traditional legal concepts which render intent a critical factor," *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978), so that courts "presume a scienter requirement in the absence of express contrary intent." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 71-72 (1994).

Because it is undisputed that the jury was never asked whether petitioner intended to threaten anyone before he was found guilty and sentenced to serve three years and eight months in federal prison for a crime of pure speech, his conviction is invalid. The judgment of the Third Circuit must be reversed.

A. Factual Background

1. This case arises out of posts petitioner made during October-November 2010 on the social media website Facebook. Facebook provides its users with a home page on which a user can post comments, photos, and links to other websites. Facebook users may become "friends" with other users. See generally E.A. Vander Veer, *Facebook: The Missing Manual* (2008), *available at* http://goo.gl/UFlK3l. Depending on the user's privacy settings, a Facebook user's home page may be viewed only by that user's "friends," or by any Facebook member who searches for that person's screen name.

Posts that a member makes on that member's home page may automatically appear in their friends' "news feed," a listing of a user's friends' recent postings. In addition, when a member posts a comment on that home page, the member has the option of "tagging" other Facebook users (including users who are not friends); doing so makes the "tagged" post ap-

pear on the "tagged" member's page. Unless two users are friends, or one "tags" the other, a Facebook user must affirmatively visit a member's page to view posts written there. See generally *Thompson* v. *Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928, at *4 n.4 (D. Nev. June 30, 2012).

2. During these events, petitioner was 27 years old. In May 2010, petitioner's wife of nearly seven years left him, taking their two children. Afterward, petitioner's supervisor at Dorney Park and Wildwater Kingdom, an amusement park in Allentown, Pennsylvania, observed him crying at work, "and he was sent home on several occasions because he was too upset to work." Pet. App. 3a.

Petitioner was actively posting on Facebook. Like many Facebook users, petitioner posted on a broad range of subjects that changed rapidly from one post to the next: expressing his sympathy for Elizabeth Edwards' family upon her death, J.A.328; joking with friends, *ibid.*; posting a hyperlink to a music video or a comedy skit he enjoyed, *ibid.*; J.A.344; noting an ACLU First Amendment lawsuit on behalf of a student suspended for rap lyrics he wrote. J.A.331.

Song lyrics were a consistent subject of petitioner's postings. Petitioner began by posting (and continued to post) the lyrics of, and links to, popular songs. See J.A.328. After his wife left, petitioner's listening habits changed: "I was listening to, you know, love songs, getting depressed. * * * I started listening to more violent music and it helped me somehow." J.A.204. Petitioner began posting compositions of his own addressing his circumstances,

which frequently took the form of rap lyrics, using "crude, spontaneous and emotional language expressing frustration." Pet. App. 55a. As petitioner explained to another Facebook user, his postings were "for me. My writing is therapeutic." J.A.329; accord J.A.205 ("[F]or me, this is therapeutic. It help[ed] me deal with the pain."). Although petitioner had a "public" Facebook profile, in mid-October 2010, petitioner changed his username from his actual name to the rap-style pseudonym "Tone Dougie," a play on his first and middle names, to distinguish himself from the postings of his "on-line persona," J.A.249, 265.

Although the language of some posts was—as with popular rap songs addressing the same themes[1]—violent, petitioner posted explicit disclaimers explaining that, for example, his posts were "fictitious lyrics" and was "only exercising [his] constitutional right to freedom of speech," J.A.331, that they were posted for "entertainment purposes only," and "d[id] not reflect the views, values, or beliefs of Anthony Elonis the person." J.A.344. Such posts also frequently included links to the Wikipedia entry on "Freedom of Speech," images related to famous First Amendment cases, links to news stories about the ACLU bringing First Amendment cases, and even reproduced the text of the First Amendment. See, *e.g.*, J.A.334, 331, 329. Some also contained "emoticons"—typographical symbols representing facial expres-

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[1] At trial, petitioner testified that he was influenced by the rap artist Eminem's songs *Guilty Conscience*, *Kill You*, *Criminal*, and *97 Bonnie and Clyde*. J.A.225. Eminem fantasized in songs about killing his ex-wife and mother using graphic language. See p. 54, *infra*; J.A.359-370.

sions to "give [the] statement[s] context," typically to indicate that he was "jest[ing]." J.A.218. Petitioner continued to be "friended" by Facebook users during this period, and, when users de-friended him because of his posts, petitioner jokingly marked their departure by writing, "Goodbye Al Qaeda Sympathizers!" J.A.329. Petitioner's posts described the wish to avoid controversy as a "Third Reich mentality" that made Facebook users "'fraid to speak out [about] injustice." J.A.341.

Two recurring themes in petitioner's posts were that "I ain't a legitimate threat," (J.A.349; accord J.A.334 (stating that a judge "needs an education on true threat jurisprudence"); J.A.336 ("I'm just an aspiring rapper")), and that imprisoning him for his posts would be tortious and would subject the authorities to legal liability. J.A.334 ("prison time will add zeros to my settlement"); J.A.351 ("I may be the only man arrested for posting rap lyrics on Facebook. Bring it. I have a feeling I'll be laughing all the way to the bank.").

3. Shortly before Halloween 2010, petitioner posted a photograph of himself and a coworker performing in costume for Dorney Park's 2009 "Halloween Haunt" (a haunted-house-themed event). Pet. App. 3a. The photograph showed petitioner in a mask holding a toy knife against his heavily-made-up coworker's neck,[2] *ibid.* As the coworker explained,

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[2] Although the government introduced evidence at trial that the co-worker had made sexual harassment complaints about petitioner, there is no evidence that petitioner knew of her confidential complaints. J.A.237.

they were "joking around. It was never meant seriously." J.A.176. Petitioner captioned the photo, "I wish." J.A.340. Petitioner did not "tag" the coworker, nor were they "friends." J.A.175. However, Daniel Hall, the "chief of Dorney Park Patrol" (Park security) and a Facebook friend, J.A.116, saw the post, interpreted it as a threat, and fired petitioner. *Ibid.* Two days later, a Facebook user commented that terminating petitioner on that basis was "the gayest piece of shit I've ever heard"; another user "liked" her comment. J.A.340.

The same day, petitioner separately posted a nearly 700-word essay criticizing his termination, saying "[t]here is no way that these two syllables ['I wish'] constitute a real or legitimate threat given the context of this photo," faulting Dorney Park's superficial investigation (observing, "[t]hankfully, opinion is protected speech"), and concluding, "Someone once told me that I was a firecracker. Nah, I'm a nuclear bomb and Dorney Park just fucked with the timer," followed by an emoticon of a face with its tongue sticking out to indicate "jest." J.A.330; see also J.A.218.

Nearly a week later, petitioner posted a Halloween-themed comment reflecting his belief that his former coworkers were preoccupied with him, and what petitioner believed they were saying about him:

> Moles. Didn't I tell y'all I had several? Y'all saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility for a man as mad as me. You see, even without a paycheck I'm still

> the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

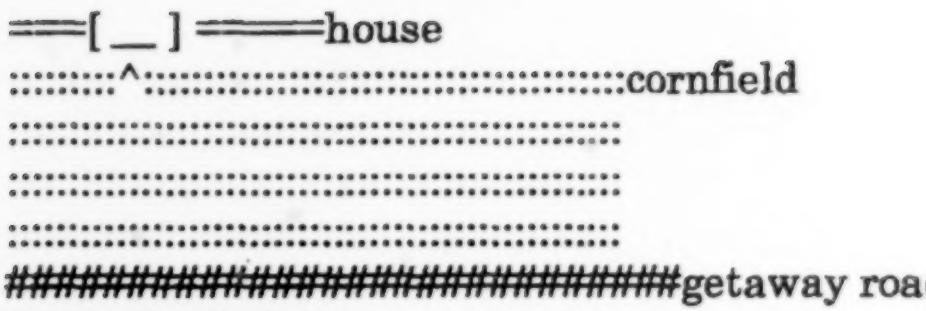
J.A.332. That post was later the basis of Count One of the indictment, on which petitioner was acquitted. Br. in Opp. 3 n.2.

In October 2010, petitioner's sister-in-law posted a Facebook status update that she was shopping for Halloween costumes with petitioner's children. J.A.342. After his wife responded, petitioner posted that his son "should dress up as matricide for Halloween," adding, "I don't know what his costume would entail though. Maybe your head on a stick?" *Ibid.* Petitioner ended the post with the tongue-sticking-out emoticon to indicate "jest." J.A.342.

In November 2010, petitioner's wife obtained a protection from abuse ("PFA") order against petitioner. J.A.242. Several days later, petitioner posted on his Facebook page a virtually word-for-word adaptation of the 2007 satirical sketch by the "Whitest Kids U' Know" comedy troupe that he and his wife had watched together. J.A.164. In that sketch, comedian Trevor Moore explained that it is illegal for a person to say that he wishes to kill the President, but not illegal to explain that it is illegal to say that one wants to kill the President. See Pet. App. 63a-64a. Petitioner's post read, in part:

> Hi, I'm Tone Elonis.
> Did you know that it's illegal for me to say I want to kill my wife?
> It's illegal.
> It's indirect criminal contempt.

It's one of the only sentences that I'm not allowed to say.
Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.
I'm not actually saying it.
I'm just letting you know that it's illegal for me to say that.
It's kind of like a public service.
I'm letting you know so that you don't accidently go out and say something like that
Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.
That's illegal.
Very, very illegal.
But not illegal to say with a mortar launcher.
Because that's its own sentence.
It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.
Perfectly legal.
I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.
Insanely illegal.
Ridiculously, wrecklessly, insanely illegal. Yet even more illegal to show an illustrated diagram.



Insanely illegal.
Ridiculously, horribly felonious.
Cause they will come to my house in the middle of the night and they will lock me up.
Extremely against the law.
Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic semper tyrannis.

J.A.333. Petitioner ended the post with the statement, "Art is about pushing limits. I'm willing to go to jail for my constitutional rights. Are you?" *Ibid.* Petitioner included a link to a video of the original skit. See Whitest Kids U' Know, *It's Illegal to Say . . .*, http://goo.gl/lDLhN4. Petitioner was not Facebook friends with his wife, nor did he tag her in that post, which was one basis for Count Two of petitioner's indictment.

In another post he made in November 2010, petitioner criticized the issuance of his wife's PFA. Petitioner explicitly invoked "true threat jurisprudence," and suggested that imprisoning him for his postings would be tortious and result in a civil settlement.

Fold up your PFA and put in your pocket
Is it thick enough to stop a bullet?
Try to enforce an Order

> That was improperly granted in the first place
> Me thinks the judge needs an education on true threat jurisprudence
> And prison time will add zeros to my settlement
> Which you won't see a lick
> Because you suck dog dick in front of children
> And if worse comes to worse
> I've got enough explosives
> to take care of the state police and the sheriff's department

Pet. App. 7a. That post was a basis for Counts Two and Three of petitioner's indictment. Above and beneath this post, petitioner posted a link to the Wikipedia entry on "freedom of speech," including photographs of the Westboro Baptist Church's controversial signs stating, "Thank God for Dead Miners." See J.A.334. See generally *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1213 (2011). A post beneath it praised an ACLU lawsuit challenging a nearby school district's decision to prohibit wearing "I [heart] Boobies" bracelets in school. See *Easton Area Sch. Dist.* v. *B.H.*, 134 S. Ct. 1515 (2014).

On November 16, 2010—more than two years before the Sandy Hook shootings—petitioner posted the following on his Facebook page:

> That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a

kindergarten class
The only question is . . . which one?

J.A.335. That post was the basis for Count Four of the indictment. Another Facebook user "liked" the post. *Ibid.* Petitioner testified that his post was a reference to an Eminem song in which the rapper fantasized about participating in the Columbine school shootings.[3] J.A.226. The surrounding posts addressed much different subjects, including a clip from a favorite movie and social commentary adapted from a song by comedian Bo Burnham. J.A.356-358.

In late November 2010, FBI Agent Denise Stevens visited petitioner at his house. J.A.65-66. When petitioner came to the door, he was not patted down. Petitioner asked if he was free to go, and when Stevens told him he was, he responded, "thank you very much," and returned inside; Stevens indicated that petitioner was polite. J.A.73, 82. After the visit, petitioner posted a "note" on his Facebook page, a type of composition that requires a reader to click on a link on the member's homepage to be taken to a separate page. The post, entitled, "Little Agent Lady," was styled as a rap song, and suggested—contrary to fact—that petitioner had been wearing a bomb during the visit. In it, petitioner describes himself as "just

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[3] See Eminem, *I'm Back*, *on* The Marshall Mathers LP (Interscope Records 2000):

I take seven (kids) from (Columbine), stand 'em all in line
Add an AK-47, a revolver, a nine
a MAC-11 and it oughta solve the problem of mine
and that's a whole school of bullies shot up all at one time
Cause (I'mmmm) Shady, they call me as crazy
as the world was over this whole Y2K thing.

an aspiring rapper," and dismisses as "shit" the agent's belief that he wants to turn "[Lehigh] Valley into Fallujah," joking that if she believed that, he had some "bridge rubble" to sell her. J.A.336.

> You know your shit's ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent Lady stood so close
> Took all the strength I had not to turn the bitch ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
> And bring yo' SWAT and an explosives expert while you're at it
> Cause little did y'all know, I was strapped wit' a bomb
> Why do you think it took me so long to get dressed with no shoes on?
> I was jus' waitin' for y'all to handcuff me and pat me down
> Touch the detonator in my pocket and we're all Goin'
>
> [BOOM!]
>
> Are all the pieces comin' together?
> Shit, I'm just a crazy sociopath
> that gets off playin' you stupid fucks like a fiddle
> And if y'all didn't hear, I'm gonna be famous
> Cause I'm just an aspiring rapper who likes the attention

> who happens to be under investigation for terrorism
> cause y'all think I'm ready to turn the Valley into Fallujah
> But I ain't gonna tell you which bridge is gonna fall
> into which river or road
> And if you really believe this shit
> I'll have some bridge rubble to sell you tomorrow
>
> [BOOM!][BOOM!][BOOM!]

J.A.336. That post was the basis for Count Five of the indictment. Petitioner did not post this to Agent Stevens, nor did he "tag" her. Aside from the comment on his sister-in-law's status update before issuance of the PFA, petitioner never posted any of his comments at issue anywhere but his own pseudonymous Facebook page, nor did he "tag" anyone in any of his posts.

B. Procedural Background

1. On December 8, 2010, petitioner was arrested and charged with violating 18 U.S.C. § 875(c). J.A.1 A grand jury indicted petitioner on five counts, for making threats to injure: patrons and employees of Dorney Park (Count One); petitioner's wife (Count Two); police officers (Count Three); a kindergarten class (Count Four); and an FBI agent (Count Five). J.A.14-17.

Petitioner moved to dismiss the indictment on the ground that the indictment failed to allege that petitioner subjectively intended to threaten, which he argued was required both by the statute and the First Amendment. Mot. to Dismiss 6, 13, 20. The district

court denied the motion, holding that circuit precedent required only the government "prove the defendant intentionally made the communication, not that he intended to make a threat," Pet. App. 51a; it was likewise constitutionally sufficient if a "reasonable person would foresee the statement would be interpreted" as a threat. Pet. App. 54a (quoting *Kosma*, 951 F.2d at 559).

Petitioner requested that the jury be instructed that "*the government must prove that [petitioner] intended to communicate a true threat.*" J.A.21. The district court denied the request, instead instructing the jury based on an objective standard:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intent to inflict bodily injury or take the life of an individual.

J.A.301.

2. Most of the fact witnesses the government called to establish how a "reasonable person" would view petitioner's posts had little familiarity with Facebook, no familiarity with rap music, and viewed petitioner's posts in isolation, largely divorced from users' comments and his surrounding posts. The FBI case agent was unaware that petitioner had provided a hyperlink to allow readers of his "It's Illegal" post to view the satire it drew upon, and never watched it, instead basing her interpretation solely on her "lit-

eral reading" of the post. J.A.77-78. She did not remember seeing comments to petitioner's posts. J.A.75-77. She also was unfamiliar with the meaning of the emoticons petitioner used to provide his Facebook posts context. J.A.75. The former coworkers the government called were unfamiliar with rap music and so "took every [post] literally," J.A.182; see also J.A.186 (Amber Morrissey "d[id]n't listen to much rap" and "wouldn't know if [posts] were rap lyrics"), or lacked experience with Facebook and did not read comments left in response to petitioner's posts. J.A.134 (Daniel Hall "wasn't a big Facebook user"); J.A.145 ("my Facebook knowledge is very limited"); J.A.140 ("not looking at the particular comments"). Furthermore, the government exhibits largely cropped posts to isolate them from comments and petitioner's surrounding posts. *E.g.*, J.A.331-332, 334-335.

In its closing argument, the government contended that it was irrelevant whether petitioner made the posts solely because doing so was "therapeutic to [him]" and helped him overcome the trauma of losing his wife, children, and job, because under the objective standard, "it doesn't matter what he thinks": "we don't have to prove he intended the[] [posts] to be threatening." J.A.286-287. The jury convicted petitioner on Counts Two through Five. J.A. 309-310.

Petitioner filed post-trial motions arguing (among other things) that a subjective standard governs. J.A.6. The district court denied the motions, concluding in relevant part that Section 875(c) does "not requir[e] that the defendant intend to make a threat." Pet. App. 38a. The court sentenced petitioner to 44

months' imprisonment, to be followed by three years' supervised release. J.A.314-315.

2. On appeal, petitioner argued (Pet.C.A.Br. 21, 30) that while the district court had relied on *Kosma*, *supra*, involving the prohibition on threats against the President, see 18 U.S.C. §871, to hold that petitioner's subjective intent was irrelevant, that decision should be reconsidered in light of *Virginia* v. *Black*, 538 U.S. 343 (2003), where this Court held that constitutionally unprotected "true threats" were "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" on someone. *Id.* at 359.

The court of appeals affirmed. Pet. App. 1a-29a. The court held that *Kosma* was "clear" "precedent" (Pet. App. 13a) that Section 875(c) required only proof that "a reasonable person would foresee that the statement would be interpreted" as a threat, *id.* at 12a (quoting *Kosma*, 951 F.2d at 557). The court rejected the argument that "*Black* indicates a subjective intent to threaten is required." *Id.* at 16a.

SUMMARY OF ARGUMENT

The Third Circuit's negligence standard for criminalizing pure speech conflicts with the plain language of 18 U.S.C. §875(c). The statutory term "threat" ordinarily means a communications with intent to cause fear, and its everyday usage confirms that a statement's status as a threat turns on the speaker's intent. The legislative history of Section 875(c), which was derived from an earlier extortion statute, confirms Congress broadened the provision to address

intentional threats whether the motive for threatening was to acquire money or other personal advantage, but not to dispense with the intent that the statement be a threat. The earliest court of appeals decisions confirm that "18 U.S.C. § 875(c) requires a showing that a threat was intended." *United States* v. *Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966).

The negligence standard also conflicts with basic principles of statutory interpretation. Because the essence of crime is wrongful intent, this Court presumes that criminal statutes require scienter absent express contrary intent, and has repeatedly read intent requirements into statutes that were silent on the subject. The Court has inferred an intent requirement even when neighboring provisions contain explicit specific intent provisions. A straightforward application of this Court's precedents requires a showing of intent before Section 875(c)'s severe penalties can be imposed to punish pure speech.

Without a subjective intent requirement, Section 875(c) would impose criminal punishment for negligent speech in violation of the First Amendment. The First Amendment's basic command is that the government may not prohibit the expression of an idea simply because society finds it offensive or disagreeable. Content-based speech restrictions are presumed invalid, subject only to narrow and limited historical exceptions, but speech cannot be "exempted from the First Amendment's protection without a[] long-settled tradition of subjecting that speech to regulation." *United States* v. *Stevens*, 559 U.S. 460, 469 (2010). There is no tradition of regulating speech as threats regardless of the speaker's intent; since the early

days of American law, it has been understood that to be punishable, statements "must be intended to put the person threatened in fear of bodily harm." *State* v. *Benedict*, 11 Vt. 236, 237-238 (1839). Moreover this Court has repeatedly insisted on a showing of culpable intent before a person can be held liable for speech. Thus, this Court has required proof a speaker subjectively intended incitement, defamation commonly requires proof the speaker acted with "actual malice," and proof of intentional misstatements is "[o]f prime importance" to establishing liability for falsehoods. *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); see also *United States* v. *Alvarez*, 132 S. Ct. 2537 (2012). And in *Virginia* v. *Black*, this Court wrote that constitutionally unprotected "true threats" are "those statements where the speaker *means to communicate* a serious expression of an intent to commit *** unlawful violence." 538 U.S. 343, 359 (2003).

Imposing criminal liability under a negligence standard would impermissibly chill speech. The vagueness, inconsistency and unpredictability of the "reasonable person" standard deprives speakers of any certainty that their comments are lawful, thereby discouraging speech. By its nature, the negligence standard's focus on third-party reactions discriminates against unfamiliar minority viewpoints. The negligence standard has *already* resulted in criminal convictions for poorly chosen words, and the risk of conviction for "felony misunderstanding" is greater still with online and electronic communications, which eliminate the inflections and expressions that give meaning to words and reduce speakers' ability to

detect and correct misimpressions. Moreover, if petitioner's writings were—as he has always maintained—therapeutic efforts to address traumatic events rather than intentional threats, they are protected speech. The negligence standard would impose criminal liability on a vast array of first-person revenge fantasies that have always been staples of popular culture. The negligence standard affords differing degrees of protection to identical words based solely on the identity of the speaker.

The government has not rebutted the presumptive invalidity of the negligence standard. It has never shown that jurisdictions requiring proof of subjective intent systematically fail to protect individuals from threats, and the pervasiveness of electronic communications improve the government's ability to prove subjective intent. Finally, this Court has consistently rejected the idea that speech should be sacrificed for hypothetical benefits to law enforcement.

ARGUMENT

I. THE TEXT OF SECTION 875(c) REQUIRES PROOF OF SUBJECTIVE INTENT TO THREATEN

A. The Plain Meaning Of Section 875(c) Requires Proof Of Specific Intent To Threaten

Section 875(c) makes it a felony, punishable by up to five years of imprisonment, to "transmit[] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." 18 U.S.C. § 875(c). The provision does not define the central

term, "threat." "It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer* v. *U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (internal quotation marks omitted).

"Every relevant definition of the noun 'threat' or the verb 'threaten,' whether in existence when Congress passed [Section 875(c)] (1932) or today, includes an intent component." *United States* v. *Jeffries*, 692 F.3d 473, 483 (6th Cir. 2012) (Sutton, J., concurring *dubitante*). *E.g.*, 11 *Oxford English Dictionary* 352 (1st ed. 1933) ("to declare (usually conditionally) one's intention of inflicting injury"); *Webster's New Int'l Dictionary* 2633 (2d ed. 1954) ("*Law*, specif., an expression of an intention to inflict loss or harm on another by illegal means, esp. when effecting coercion or duress"); *Black's Law Dictionary* 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another"). Every common definition embodies the fundamental notion that a "threat" is the expression of the speaker's *intention* to injure; "Conspicuously missing from *any* of these dictionaries is an objective definition of a communicated 'threat,' one that asks *only* how a reasonable observer [or speaker] would perceive these words." *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*).

This intuitive understanding is confirmed by everyday use. Two of the most common responses to menacing-sounding statements (and indeed, two of the most common uses of forms of the word) are "Is

that a threat?" and "Are you threatening me?"[4] Those questions plainly inquire into *the speaker's intent*; they would be unnecessary (indeed, nonsensical) if a statement's status as a threat turned on a reasonable person's perception.

B. Legislative History And Early Case Law Confirm The Need For Specific Intent

1. The history of Section 875 reinforces this commonsense understanding. The first national law addressing the communication of threats was the Patterson Act, enacted in 1932 in response to the Lindbergh baby kidnapping. See Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649, codified at 18 U.S.C. § 876. The law was directed exclusively at extortion, and thus textually prohibited only a "demand or request for ransom" "with intent to extort." 47 Stat. 649. "From the beginning, the communicated 'threat' thus had a subjective component to it." 692 F.3d at 484 (Sutton, J., concurring *dubitante*).

Seven years later, at the request of the Justice Department, Congress created a new provision to address cases where defendants were not explicitly extorting something for themselves, but were seeking something of value for a third party (*e.g.*, threatening an official to coerce release of a third party from prison), or making threats "on account of revenge or spite" or "animosity" without "any motive or purpose to extort money." *Threatening Communications: Hearing on H.R. 3230 Before the H. Comm. on the Post Office & Post Roads*, 76th Cong. 7, 9 (1939).

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[4] *E.g.*, *Is that a threat?*, TV Tropes, http://goo.gl/qwzirC (collecting examples).

Congress thus expanded the statute by adding a provision, now codified at Section 875(c), to include also "threat[s] to kidnap any person or any threat to injure the person." Pub. L. No. 76-76, 53 Stat. 742 (1939). But while Congress intended these amendments to "render present law more flexible," *Threatening Communications*, at 5 (statement of William W. Barron, Criminal Division, Dept. of Justice), Congress gave no hint that it meant to write subjective intent out of the statute. Rather, "what dominated the discussion was the distinction between threats made for the purpose of extorting money and threats borne of other (intentional) purposes," such as revenge, spite, and animosity. *Jeffries*, 692 F.3d at 484 (Sutton, J. concurring *dubitante*). Thus, for example, Members agreed that threats should be actionable "[w]hether the motive of the threat be the acquisition of money or some other personal advantage." *Threatening Communications* at 12.

2. The earliest court of appeals decisions addressing the issue overwhelmingly concluded that "a conviction under 18 U.S.C. §875(c) requires a showing that a threat was intended." *United States* v. *Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966); accord *United States* v. *LeVison*, 418 F.2d 624, 626 (9th Cir. 1969) ("intent to threaten is an essential element of the crime"); *Seeber* v. *United States*, 329 F.2d 572, 577 (9th Cir. 1964) (noting "vital issue of intent"); *United States* v. *Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974) ("a conviction under 18 U.S.C. §875(c) requires proof that the threat was made knowingly and intentionally") (citing *LeVison*, *Dutsch*, and *Seeber*); cf. *United States* v. *Kelner*, 534 F.2d 1020, 1023 (2d

Cir. 1976) (describing as "quite proper[]" jury instruction that "a specific intent to communicate a threat to injure" was sufficient for conviction). Some cases *also* required that the words be reasonably construed as a threat, *e.g.*, *Bozeman*, 495 F.2d at 510 (words have a "reasonable tendency to create apprehension"). Over time, without ever overruling those earlier cases, the intent requirement quietly fell by the wayside in many circuits, leaving just the objective test that exists in those courts today. See Pet. App. 15a n.5; but see *United States* v. *Twine*, 853 F.2d 676, 680 (9th Cir. 1988) (reaffirming *LeVison* and *Seeber*); cf. *Jeffries*, 692 F.2d at 486 (Sutton, J., concurring *dubitante*) (suggesting courts simply "g[o]t into grooves") (internal quotation marks omitted).

C. The Third Circuit's Negligence Standard Conflicts With Fundamental Principles Of Statutory Interpretation

1. The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (quoting *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978)).

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. *United States*, 342 U.S. 246, 250 (1952). Thus, for centuries, it has been understood that with

rare exception, "to constitute any crime there must first be a 'vicious will.'" *Id.* at 251 (quoting 4 *Blackstone's Commentaries* 21); accord Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 227 (2d ed. 1858) ("the essence of an offence is the wrongful intent, without which it cannot exist"); Model Penal Code ("MPC") § 2.02 cmt. 2 (1980) ("It was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.").

Courts therefore "presum[e] that some form of scienter is to be implied in a criminal statute even if not expressed," *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994), and "offenses that require no *mens rea* generally are disfavored," *Staples*, 511 U.S. at 606 (citing *Liparota* v. *United States*, 471 U.S. 419, 426 (1985)). Because "Congress [is] presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor," "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *U.S. Gypsum*, 438 U.S. at 437-438. Thus, this Court will "presume a scienter requirement in the absence of express contrary intent." *X-Citement Video*, 513 U.S. at 71-72; accord *U.S. Gypsum*, 438 U.S. at 437 (presume in "absence of contrary direction"). That presumption "appl[ies] to each of the statutory elements that criminalize otherwise innocent conduct," *X-Citement Video*, 513 U.S. at 72.

Thus, this Court time and again has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *X-Citement Video*, 513 U.S. at 70. Thus, in *Morissette*, this Court "used the background presumption of evil intent to conclude that the term 'knowingly'" in a theft of government property statute "required that the defendant have knowledge of the facts that made the taking a conversion—i.e., that the property belonged to the United States,"—although the word "knowingly" "in its isolated position [there] suggested that it * * * required only that the defendant intentionally assume dominion over property." *X-Citement Video*, 513 U.S. at 70. In *Liparota*, the Court invoked the presumption to conclude that a statute prohibiting specified "knowing[]" misuses of food stamps required knowledge *both* of the stamps' "use[], transfer[], acqui[sition], alter[ation], or possess[ion]," as well as that the use was "in any manner not authorized by [the statute]." 419 U.S. at 425-427. In other words, it required proof of "knowledge of illegality." *Id.* at 430.

In *Staples*, the Court likewise invoked the presumption to hold that to be guilty of violating a provision prohibiting possession of "a firearm which is not registered," a defendant must know that the weapon possessed the automatic firing capability that made it subject to registration, although the statute was "silent concerning the *mens rea* required for a violation." 511 U.S. at 605; see also 26 U.S.C. §5861(d). And in *X-Citement Video*, this Court invoked the presumption to hold that a statute prohibiting the "knowing[] transport[ation] or

ship[ment]" of "any visual depiction" if its production "involves the use of a minor engaging in sexually explicit conduct," required proof that the defendant both "knowingly transport[ed] or ship[ped]" the depiction *and* knew those depicted were minors. 513 U.S. at 68, 78. It did so although "the most grammatical reading of the statute" would have required knowledge only of the transportation element of the offense. *Id.* at 70.[5]

2. A straightforward application of this Court's precedents compels the conclusion that conviction of violating Section 875(c) requires proof that the defendant *intended* the charged statement to be a "threat"—"the crucial element separating legal innocence from wrongful conduct." *X-Citement Video*, 513 U.S. at 73. See *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*) ("It is not enough that a defendant knowingly communicates *something* * * *; he must communicate a threat, a word that comes with a state-of-mind component."). That conclusion is underscored by "[t]he severity of the[] sanctions" (*U.S. Gypsum*, 438 U.S. at 442 n.18) imposed by Section 875(c)—five years of imprisonment, compare *ibid.* (noting Sherman Act's *three*-year maximum)—

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[5] Accord *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 516, 524 (1994) (invoking presumption to hold that statute prohibiting interstate "sale and transportation * * * [of] drug paraphernalia," with no explicit *mens rea* requirement, requires proof that defendant "knew that the items * * * are likely to be used with illegal drugs"); *U.S. Gypsum*, 438 U.S. at 444 (invoking presumption to hold that antitrust violations require proof that defendant acted "with knowledge that the proscribed effects would most likely follow").

which "suggest[s] that Congress did not intend to eliminate a *mens rea* requirement." *Staples*, 511 U.S. at 618; see also *Morissette*, 342 U.S. at 256 (noting courts less likely to infer an intent requirement where penalties "are relatively small" and reputational effects slight). "The reasonable man rarely takes the stage in criminal law. Yet, when he does, the appearance springs not from some judicially manufactured *deus ex machina* but from an express congressional directive." *Jeffries*, 692 F.3d at 485 (Sutton, J. concurring *dubitante*).

Moreover, this case, unlike its predecessors, involves a prohibition on *pure speech*, and thus necessarily raises grave concerns about suppressing protected speech. "[T]he expectations that individuals may legitimately have" (*Staples*, 511 U.S. at 619) counsels against concluding that negligence is sufficient. "Persons do not harbor settled expectations" that their statements are "subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view." *X-Citement*, 513 U.S. at 71. Cf. generally *United States* v. *Bailey*, 444 U.S. 394, 405 (1980) (noting that for certain "classes of crimes," "heightened culpability has been thought to merit special attention"). Moreover, this Court noted in *U.S. Gypsum* that difficulties in line-drawing and the risk of overdeterring socially beneficial behavior compelled the conclusion that "the concepts of recklessness and negligence have no place" in determining the *mens rea* of *antitrust* offenses. The Court's reasoning there applies *a fortiori* to the regulation of speech:

> the behavior proscribed by the [statute] is often difficult to distinguish from the gray zone of socially acceptable * * * conduct. * * * The imposition of criminal liability * * * for engaging in such conduct which only after the fact is determined to violate the statute, * * * without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary * * * conduct lying close to the borderline of impermissible conduct might be shunned by [those] who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.

U.S. Gypsum, 438 U.S. at 440-441. A so-called "objective" standard has no place in regulating pure speech. As Justice Marshall explained,

> we should be particularly wary of adopting such a [negligence] standard for a statute that regulates pure speech. * * * . Th[e] degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect.

Rogers v. *United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring); accord *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) (noting that "*mens rea* requirements * * * provide 'breathing room' * * * by reducing an honest speaker's fear that he may accidentally incur liability for speaking.").[6] At a minimum, Section 875(c) should be

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[6] Accord *United States* v. *White*, 670 F.3d 498, 524-525 (4th Cir. 2012) (Floyd, J., concurring in part and dissenting in part);

construed "so as to avoid substantial constitutional questions," *X-Citement Video*, 513 U.S. at 69, and in favor of the defendant where a statute's "text, structure, and history fail to establish that the Government's position is unambiguously correct," *United States v. Granderson*, 511 U.S. 39, 54 (1994).

3. "Further, the use of criminal sanctions [based on an objective standard] would be difficult to square with the generally accepted functions of the criminal law. The criminal sanctions would be used, not to punish conscious and calculated wrongdoing," *U.S. Gypsum*, 438 U.S. at 442, but simple *negligence*. Moreover, it is difficult to "imput[e] * * * to Congress" an intent to "employ criminal sanctions" to punish negligent conduct that is widely understood to be insufficient even to support civil tort liability. Cf. *ibid.* (noting "availability * * * of nonpenal alternatives" to support conclusion that Congress did not intend criminal statute to reach such behavior). The tort of negligent infliction of emotional distress, for example, ordinarily does not permit recovery for emotional harm resulting from a tortfeasor's negligence absent physical impact to the plaintiff or a close relative, or the "immediate risk of physical harm." See *Consol. Rail. Corp.* v. *Gottshall*, 512 U.S. 532, 544-549 (1994). To recover absent actual

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Planned Parenthood of the Columbia/Willamette, Inc. v. *Am. Coal. of Life Activists*, 290 F.3d 1058, 1108 (9th Cir. 2002) (en banc) (Berzon, J., dissenting); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 316 (2001) ("Punishing merely negligent speech will chill legitimate speech by forcing speakers to steer clear of any questionable speech.").

physical impact or a "near miss" (*ibid.*) generally requires proof the tortfeasor acted *intentionally* (or at least recklessly). See 2 Restatement (Third) of the Law Torts: Liability for Physical & Emotional Harm § 46 (2012). And it is generally understood that intentional infliction of emotional distress requires more than an "insult" or "threats," *e.g.* Restatement (Second) of Torts § 46 cmt. d (1965) (telling person that "if he were there he would break her god damned neck" was a "mere insult[]" and "is not so outrageous or extreme" as to result in tort liability). The availability of this tort remedy—only upon a higher, more speech-protective showing—both underscores the improbability of Congress meaning to impose criminal liability for negligent speech, and makes clear that tort provides an adequate remedy.

4. It is of no moment that two subsections of Section 875 include textual specific intent requirements—that threats to "kidnap" or "injure the person of another" (18 U.S.C. § 875(b)), and to "injure the property or reputation" of another or "to accuse [another] of a crime" (*id.* § 875(d)) must be made with the "intent to extort * * * any money or other thing of value." *Id.* § 875(b), (d). As explained above, see pp. 24-25, *supra*, those provisions' textual specific "intent to extort" requirements reflects the law's original purpose of addressing extortion, and the follow-on effort to address threats was made without an effort to extort something of value. "Congress offered no hint that it meant to write subjective conceptions of intent out of the statute." *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*). The absence of explicit language from Section 875(c) requiring an

intent to extort is sufficient basis for not requiring *that particular* specific intent be shown; it is, however, no basis for dispensing with any requirement of a showing of intent that the statement be a threat.

Indeed, this Court has repeatedly inferred scienter requirements for statutes that were silent on the subject, even when neighboring provisions contained *express* scienter requirements, calling "[t]he difference in wording * * * too slender a reed to support the attempted distinction." *Liparota*, 471 U.S. at 429 (concluding 7 U.S.C. § 2024(b)(1) requires knowledge food stamps are being used in violation of statute, although § 2024(c) explicitly requires action "knowing the s[tamps] to have been received, transferred, or used * * * in violation of [the statute] or the regulations"); *Carter* v. *United States*, 530 U.S. 255, 269-270 (2000) (while neighboring provision included explicit "intent to steal or purloin" justified excluding that specific intent from neighboring provision, nevertheless implying intent requirement in provision silent on the subject).

II. WITHOUT A SUBJECTIVE INTENT *MENS REA*, SECTION 875(c) CRIMINALIZES NEGLIGENT SPEECH AND VIOLATES THE FIRST AMENDMENT

The "bedrock principle underlying the First Amendment * * * is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). Accordingly, the Constitution "demands that content-based

restrictions on speech be presumed invalid, and that the government bear the burden of showing their constitutionality." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004) (citation omitted). "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas,"—"well-defined and narrowly limited classes of speech, the prevention and punishment of which" have, as a matter of "histor[y] and traditio[n]," been deemed constitutionally permissible. *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted). For example, the government may punish speech or conduct that is obscene, defamation, and incitement. *Ibid.* (collecting authorities).

In *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam), this Court carved out a limited exception for "true threats" of physical violence. Compare *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982) ("'threat[]' of vilification or social ostracism * * * is constitutionally protected"). *Watts* involved a prosecution for threatening the President, see 18 U.S.C. §871(a), based on a protester's statement during a rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. In a brief *per curiam* opinion, the Court concluded from the remark's context that it was not a true threat—it was made at a political rally, was conditioned on another event (induction into the armed forces), and both the speaker and the crowd responded with laughter. *Id.* at 707-708. The Court explicitly refrained from addressing the required mental state, although it

expressed "grave doubts about" the lower court's holding there that it was enough to voluntarily utter words with the "*apparent* determination to carry them into execution." *Id.* at 707 (internal quotation marks omitted, emphasis in original).

A. History And Tradition Counsel Against Imposing Criminal Liability For Negligent Speech

This Court has held that a "category of speech" cannot be "exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation." *Stevens*, 559 U.S. at 469; *Alvarez*, 132 S. Ct. at 2544 (opinion of Kennedy, J.) ("content-based restrictions" have been permitted "only when confined to the few historic and traditional categories [of expression] long familiar to the bar") (internal quotation marks omitted). There is, however, no established tradition of subjecting speech to criminal liability as a "threat" absent a subjective intent to threaten; to the contrary, history suggests such an intent is a fundamental prerequisite to imposing liability.

1. Threat Prosecutions Traditionally Have Required Proof Of Intent To Threaten Or Other Specific Intent

"It seems to be well settled that the making of threats, in words not written, followed by no result more serious than the terror of the person threatened, [wa]s not an indictable offense at common law." 25 *The American & English Encyclopaedia of Law* 1064 (Charles F. Williams ed., 1894); accord 2 Francis Wharton, *Criminal Law & Proc.* § 803 (Ronald A.

Anderson ed., 12th ed. 1957); MPC §212.5 cmt. 1. However, states, "by statute * * * sometimes made [it] a crime to threaten another in manner to amount to disturbance of the public peace," 2 Wharton, *Criminal Law* §803, which typically involved oral threats delivered in the presence of the victim. But "it is usually held, however, that a threat, in order to violate the public peace, * * * *must be intended to put the person threatened in fear of bodily harm* and must produce that effect, and must be of a character calculated to produce that effect upon a person of ordinary firmness." *Ibid.* (emphasis added). As the Vermont Supreme Court explained in the seminal case of *State* v. *Benedict*, 11 Vt. 236 (1839), "[a] threat, in order to [be punishable], must be * * * accompanied by acts showing a formed intent to execute them, [and] *must be intended to put the person threatened in fear of bodily harm.*" *Id.* at 239 (emphasis added); accord *Ware* v. *Loveridge*, 42 N.W. 997, 998 (Mich. 1889) ("the authorities have very plainly held that ["language tending to provoke a breach of the peace"] covers nothing that is not meant and adapted to bring about violence directly"). The *Model Penal Code* commentary confirms that both criminal and civil law provide liability for "one who intentionally placed another in fear of bodily injury." MPC §211.1 cmt. 1.

In addition, both at common law and by statute, threats have been prosecuted as extortion when used to obtain something of value. 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* §1201, at 664 (6th ed. 1877). Implicit in conviction for using threats "to terrify another [person] out of his money," *id.* §1173, at 650, is the conclusion that the defendant

intended the statement to be a threat. Cf. 25 *Encyclopaedia of Law* 1065 (crime involves "intent to compel [victim] to do an act against his will"). Some states also prohibited "sending threatening letters," in which the threat was part of a criminal scheme to extort property or "do some other unlawful act." *Id.* at 1073. But it has always been understood that such statutes require the specific intent to extort or complete the other offense; if sent "with the view of having merriment at [the victim's] discomfiture on its receipt," there was no crime. *Norris* v. *State*, 95 Ind. 73, 76 (1884) ("Unless such intent [to extort] existed in the mind of the [defendant] at the time of sending the letter, there could be no crime."); accord 2 Bishop, *Criminal Law* § 1201, at 664 ("The intent, both under the unwritten law and under the statutes, must be evil."); see also Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 975, at 545 (1866) (if "the true intent" is not proved at trial, "the proceeding will fail).

As noted above, until the late 20th Century, Section 875(c) was generally construed to require proof of intent to threaten. See pp. 25-26, *supra*. In addition, the *Model Penal Code* threat provision requires proof the defendant acted "with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience." MPC § 211.3; see also *id.* § 212.5 cmt. 2 ("At a minimum, therefore, the actor must perceive and consciously disregard a substantial and unjustifiable risk that his communication constitutes a

threat"). There is simply no established historical tradition of imposing criminal liability based on a speaker's negligent failure to anticipate that it would be perceived as a threat.

2. *This Court Has Repeatedly Required Proof Of Prohibited Intent Before Allowing Speech To Be Sanctioned*

This Court has repeatedly insisted, in a variety of contexts, that before a person can be held liable for speech, there must be proof he acted with culpable intent. "*[M]ens rea* requirements * * * provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment).

a. One prominent example likewise implicates the state's interests in preventing fear of violence: incitement. Criminal prosecution for incitement "is commonly construed to require * * * [that] the speaker *subjectively intended* incitement." John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries*, 10 Hastings Comm. & Ent. L.J. 969, 972 (1988). Thus, this Court has required proof that the defendant's "advocacy of the use of force * * * is *directed to* inciting or producing imminent lawless action," *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (emphasis added), and held that without "evidence * * * [a speaker's] words were intended to produce, and likely to produce, imminent disorder * * * those words could not be punished." *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curi-

am); *Alvarez*, 132 S. Ct. at 2544 (opinion of Kennedy, J.).

This Court's decision in *Claiborne Hardware* is hard to square with the idea that the perceptions of "reasonable" observers are controlling. There, Mississippi merchants sought damages for an NAACP-organized boycott against the organization and its officers, specifically local officer Charles Evers, who had discouraged boycott violations during speeches to African Americans. Evers had warned that boycott violators would be "disciplined," stating that, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," and that the "Sheriff could not sleep with boycott violators at night." 458 U.S. at 902. The organization publicized the names of boycott violators, and in some instances, violators were subject to violent retaliation, resulting in an "atmosphere of fear." *Id.* at 904 (internal quotation marks omitted).

The Court acknowledged that Evers' remarks "*might have been understood as* * * * intending to create a fear of violence." *Id.* at 927 (emphasis added). Nonetheless, the Court concluded that Evers "did not exceed the bounds of protected speech," *id.* at 929, concluding he could not be liable for incitement unless his advocacy was "directed to inciting or producing imminent lawless action." *Id.* at 928 (quoting *Brandenburg*, 395 U.S. at 447). The Court emphasized that where liability is imposed "in the context of constitutionally protected activity, * * * 'precision of regulation' is demanded," *id.* at 916 (internal quotation marks omitted), because of the "profound national commitment" to free speech, *id.* at 913. The Court

noted the lack of evidence that "any petitioner specifically intended to further an unlawful goal." *Id.* at 925 n.68.

b. Similarly, this Court has held that, to protect First Amendment interests, public figures alleging defamation must demonstrate that the speaker acted with "'actual malice'—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). The Court reasoned that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" *Sullivan*, 376 U.S. at 271-272 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). "[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of" First amendment rights; thus, "a rule of strict liability * * * may lead to intolerable self-censorship." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Thus, a standard of "negligence * * * is constitutionally insufficient." *Sullivan*, 376 U.S. at 288.

"The constitutional guarantees of freedom of expression compel application of the same standard to * * * criminal [libel]" prosecutions, *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), which have "virtual[ly] disappear[ed]" in the United States, *id.* at 69.[7] Reflecting the growing consensus that imposing crimi-

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[7] Org. for Sec. & Coop. in Europe, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve* 172 (2005) (noting that, during 1992-2004, there were six criminal libel convictions nationwide; three were reversed on constitutional grounds), http://goo.gl/A27xBi.

nal liability based on negligence conflicts with our national commitment to free speech, many states now explicitly require proof of knowing falsity. *E.g.*, Kan. Stat. Ann. §21-6103(a)(1); N.H. Rev. Stat. Ann. §644:11; Utah Code Ann. §76-9-404; Va. Code Ann. §18.2-209.[8]

c. In a variety of other contexts, this Court has reaffirmed the central importance of imposing liability for speech only upon a showing of wrongdoing. Thus, in determining whether a prohibition on fraudulent fundraising calls satisfied First Amendment strictures, this Court considered it "[o]f prime importance" that a person not be subject to civil liability based on "false statement alone," absent proof by "clear and convincing evidence" that the speaker "kn[e]w[] that the representation was false" and "made the representation with the intent to mislead the listener." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). The Court emphasized that "[e]xacting proof requirements of this order * * * have been held to provide sufficient breathing room for protected speech." *Ibid.* And in *United States* v. *Al-*

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[8] In the *civil* context, this Court has not required a showing of actual malice for lawsuits involving private citizens and matters of private concern. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U.S. 749 (1985) (plurality opinion). The Court has not yet had occasion to address the application of criminal libel in such circumstances. But the Court has noted, in the context of defamation on matters of public concern involving private citizens, that the state's interest in "punish[ing] reprehensible conduct and * * * deter[ring] its future occurrence" (there, through punitive damages) is less compelling than its interest in compensating individuals. *Gertz*, 418 U.S. at 349-350. The same, presumably, would be true of criminal prosecutions.

varez, which invalidated a federal statute prohibiting false claims to military decorations, a majority of the Court indicated that limiting a criminal statute's sweep to "knowing or reckless falsehood" was a constitutional prerequisite under the First Amendment. 132 S. Ct. at 2545 (opinion of Kennedy, J.) ("falsity alone may not suffice to bring the speech outside the First Amendment"); *id.* at 2552-2553 (Breyer, J., concurring in the judgment) (construing statute to reach only "statements made with knowledge of their falsity and with the intent that they be taken as true" "diminishes the extent to which the statute endangers First Amendment values, [but] does not eliminate the threat"). As Justice Kennedy noted, "[t]he requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery * * * exists to allow more speech." *Id.* at 2545.

B. *Black* Recognized A First Amendment Subjective Intent Requirement For Statutes Criminalizing Threats

The impermissibility of allowing liability for speech without proof of wrongful intent was front and center in *Virginia* v. *Black*, where the Court explained that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359 (citations omitted; emphasis added). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the vic-

tim in fear of bodily harm or death." *Id.* at 360 (emphasis added).

Those statements were central to the Court's reasoning. *Black* involved a Virginia statute that criminalized burning a cross in public "with the intent of intimidating any person," and provided that the public burning of a cross "shall be prima facie evidence of an intent to intimidate." 538 U.S. at 347-348 (quoting Va. Code Ann. § 18.2-423 (1996)). Although cross burning is "widely viewed as a signal of impending terror," *id.* at 391 (Thomas, J., dissenting), because of the "long and pernicious history" of its use for that purpose, *id.* at 363 (opinion of O'Connor, J.), a plurality of the Court explained that a subjective intent requirement was constitutionally necessary to distinguish "constitutionally proscribable intimidation" from protected "core political speech," such as when a cross is burned as a statement of ideology or an expression of group solidarity. *Id.* at 365-366 (opinion of O'Connor, J.). The prima facie evidence provision was facially unconstitutional because it "ignore[d] all the contextual factors that are necessary to decide whether a particular cross burning was intended to intimidate. The First Amendment does not permit such a shortcut." *Id.* at 367. Thus, the prima facie evidence provision "strip[ped] away the very reason a state may ban cross burning with the intent to intimidate." *Id.* at 365.

The other Justices agreed that "a burning cross is not always intended to intimidate, and a nonintimidating cross burning cannot be prohibited." *Id.* at 372 (Scalia, J., joined by Thomas, J., concurring in part, concurring in the judgment in part, and dissent-

ing in part). Accord 538 U.S. at 368 (Stevens, J., concurring) (emphasizing "intent to intimidate" language as a defining trait of a valid regulation of threats); *id.* at 385-386 (Souter, J., joined by Kennedy and Ginsburg, JJ., concurring in part and dissenting in part) (distinguishing between "proscribable and punishable" intent to intimidate and a "permissible" lack of intent to intimidate). The requirement that the speaker intends his speech to be threatening was thus central to the Court's holding. See *United States* v. *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (O'Scannlain, J.) ("[E]ach of the other opinions [in *Black*], with the possible exception of Justice Thomas's dissent, takes the [plurality's] view of the necessity of an intent element."). If the "true threats" doctrine did not require proof of intent to threaten, then "Virginia's statutory presumption was * * * incapable of being unconstitutional in the way that the majority understood it." Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217.

C. The Negligence Standard Impermissibly Chills Protected Speech

Time and again, this Court has written that criminal prohibitions are "matter[s] of special concern" under the First Amendment because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno* v. *ACLU*, 521 U.S. 844, 871-872 (1997); accord *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment). "Because First Amendment freedoms need breathing space to survive, government may regulate [speech]

* * * only with narrow specificity," *Button*, 371 U.S. at 433, "extreme care," *Claiborne Hardware*, 458 U.S. at 927, and "exacting proof requirements." *Madigan*, 538 U.S. at 620.

1. The Negligence Standard Is Indeterminate And Unpredictable

The negligence standard is the polar opposite of regulating with "extreme care." Under it, "it doesn't matter what [the defendant] thinks." J.A.286. Punishment is based not on what the defendant intended to communicate, or even the message he would have foreseen had he not "consciously disregard[ed] a substantial and unjustifiable risk" his statement would be construed as a threat. MPC §212.5 cmt. 2. Instead, it imposes criminal liability based on jurors' determination, months or years later, that a speaker has negligently misjudged how his audience would view his remarks. As Justice Marshall observed, "we should be particularly wary of adopting such a standard for a statute that regulates pure speech," which "create[s] a substantial risk that crude, but constitutionally protected speech might be criminalized." *Rogers*, 422 U.S. at 47 (Marshall, J., concurring). Because "individuals w[ill] have difficulty discerning what a jury would consider objectively threatening," they "may rationally err on the side of caution by saying nothing at all." Case Comment, *United States* v. *Jeffries*, 126 Harv. L. Rev. 1138, 1145 (2013).

Uncertainty is inherent in tests based on the reaction of a hypothetical "reasonable person." The "reasonable person" test for negligence has long been criticized as "a vague test," Oliver Wendell Holmes, *The*

Common Law 112 (Little, Brown & Co. 1909) (1881), that yields "biased, inconsistent, and unpredictable verdicts." Brian Kennan, *Evolutionary Biology and Strict Liability for Rape*, 22 Law & Psychol. Rev. 131, 173 (1998); Robert J. Rhee, *Tort Arbitrage*, 60 Fla. L. Rev. 125, 172 (2008) (standard is inherently "uncertain and thus unpredictable"). It invites jurors to substitute their personal attitudes about what behavior is acceptable. See generally Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 Geo. L.J. 633, 654 (2003) ("[J]uror norms give content to the reasonable person standard."). In addition to the widely variable perspectives of individual jurors, demographic factors can shape risk and threat perceptions. Cf. Ian Savage, *Demographic Influences on Risk Perceptions*, 13 Risk Analysis 413, 419 (1993) (identifying "very statistically significant" "variations in risk perceptions explained by demographics," with some groups "feel[ing] greater exposure and fear"), http://goo.gl/WEgHFK.

Liability thus turns on the happenstance of the individual jurors selected to serve, which creates additional uncertainty in an increasingly heterogeneous and fractured society. It is telling that of petitioner's nearly three hundred "friends," only one person—Chief Hall of the Dorney Park Patrol, with his "very limited" Facebook knowledge—was moved to report petitioner's posts to law enforcement; nor is there any indication users sought to "report" or "flag" petitioners' posts to Facebook, although that is simple to do. J.A.102, 105. Had jurors been seated like the Facebook user who "liked" petitioner's school-shooting post, evidently understanding it was not meant liter-

ally; like the user who thought it was ridiculous that petitioner was fired for the "I wish" caption (or the user who "liked" her comment); and the users who "friended" petitioner throughout this period, *e.g.*, J.A.329, the outcome in this case could have been completely different. The vagueness and indeterminacy of the negligence standard heightens its deterrent effect upon speech. Cf. *Riley* v. *Nat'l Federation of the Blind*, 487 U.S. 781, 793-794 (1988) ("[s]peakers, however, cannot be made to wait" to "speak with a measure of security" regarding a "reasonableness" standard for fundraising fees); *Reno*, 521 U.S. at 872 (vague regulations "increas[e] deterrent effect" on speech).

2. The Negligence Standard's Focus On Third Party Reactions Institutionalizes Discrimination Against Minority Viewpoints

Focusing on the reaction of a "reasonable person," rather than the speaker's intent, chills speech in another respect—by institutionalizing discrimination against minority viewpoints. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty., Ga.* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). Members of unpopular groups, immigrants, minorities—anyone who seems "different" from the jurors who are the arbiters of reasonableness (and who, statistically, are members of majority groups)—are more likely to seem threatening than people who look and speak and *think* like they do. Cf. *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) ("[T]hose who are unpopular may fear that the government will use [the prosecution of false statements] selectively, * * * while ignoring members

of other political groups who might make similar false claims."). Thus, there can be little doubt that a "reasonable person" would have viewed it as a threat if a member of an unpopular group or of an unfamiliar religious minority had said, "you ever do that again, I'll throw you off this f-----g balcony," "I'll break you in half"; had petitioner posted it on Facebook, it would have been the sixth count in his indictment. But when said by a telegenic Member of Congress and former Marine and FBI agent, it is not a matter for law enforcement. See Adam Edelman & Joseph Straw, *New York Rep. Michael Grimm Threatens Reporter After Being Asked About Fundraising Allegations*, N.Y. Daily News, Jan. 28, 2014, http://goo.gl/xjzgvh.

That analysis has it exactly backwards: The First Amendment is designed to protect unpopular viewpoints from suppression by majorities. An objective test explicitly bases the lawfulness of statements on how others—typically members of *majority groups*—view them.

3. *The Negligence Standard Criminalizes Misunderstandings, Which Are Increasingly Likely Using New Communications Media*

Because of the limitations of language and differences in how people read others' signals, miscommunication is inescapable, even for face-to-face meetings and telephone calls. The potential for misunderstanding is multiplied when using email, where the communications lack the cues of "[g]esture, voice, expression, context," which do "more than merely supplement" the meaning of words used, but "alter it

completely." Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?*, 89 J. Personality & Soc. Psychol. 925, 933 (2005). The potential for misunderstanding is multiplied "in the context of Internet postings, where the tone and mannerisms of the speaker are unknown," Kyle A. Mabe, Note, *Long Live the King:* United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 Golden Gate U. L. Rev. 51, 88 (2013), and the speaker may not witness the listener's reaction and thus know to correct misimpressions. Emoticons—typographical representations of facial expressions—were invented for the very purpose of adding context to electronic communications, but they too are subject to misunderstandings. Compare J.A.218 (petitioner believed tongue-sticking-out emoticon indicated "jest"), with J.A.174 (estranged wife considered it an insult).

It is not hard to imagine a benign statement being misconstrued as a threat. A statement that the listener "will regret" a course of action is frequently intended to advise the person of a belief the listener will later think better of it, or that it will turn out badly; but the listener could also interpret it as a threat that the speaker will *make* the listener regret it by inflicting harm if that course is pursued. Such misunderstandings are common. See, *e.g.*, *Exchange Between Bob Woodward and White House Official in Spotlight*, CNN Politics (Feb. 27, 2013), http://goo.gl/K3QZkR. There are many sensitive situations—say, a picketer addressing visitors to a health clinic, or a husband texting his wife about plans to move out—where a negligence standard

would transform a common misunderstanding into a felony.

Another example is more chilling still because it is not hypothetical. In *United States* v. *Fulmer*, an informant who had reported a suspected bankruptcy fraud was convicted of threatening an FBI agent because he left the agent a voicemail saying that the "silver bullets are coming." 108 F.3d 1486, 1490 (1st Cir. 1997). The agent, unfamiliar with the term "silver bullets" to describe a simple solution to an intractable problem, found the phrase to be "chilling" and "scary." *Ibid.* Despite two witnesses' testimony that the defendant used "silver bullets" to refer to "clear-cut" evidence of wrongdoing, *ibid.*, the court concluded that, under the objective standard, the defendant was validly convicted of threatening the agent. *Id.* at 1491-1492. Thus, the negligence standard poses a very real risk of criminalizing "poorly chosen words." Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 350 (2001).

The record in this case further illustrates the dangers of basing criminal liability on supposedly "objective" interpretations. For example, a coworker posed for a photo with petitioner holding a toy knife to her throat, and clearly understood that, in posing for it, "we were just joking around. It was never meant seriously." J.A.176. Because the photo was itself a joke, it is not hard to imagine that in posting the photo on Facebook with the caption, "I wish," petitioner might simply have meant to continue the joke. While petitioner might have anticipated that such a joke would fall flat or be deemed tasteless, it is not self-evident that a coworker would take a comment to an

acknowledged joke photo "literally," J.A.182, *as a death threat*. It is not hard to see the opportunity for misunderstanding. The objective standard transforms even negligent misunderstandings into felonies.

D. Absent Intent To Threaten, Petitioner's Posts Were Protected Speech

Reviewing the statements petitioner served nearly four years in prison for making underscores the risk that a negligence standard poses to protected expression.

Even the government would not contest that *some* elements of petitioner's posts warranted First Amendment protection; for example, he was entitled to state his belief that the judge who granted the restraining order against him "needs an education on true threat jurisprudence." J.A.334. But under the government's theory, *any* discussion of violent subjects that a jury later ties to an actual person is fair game for a threat prosecution. As the government said revealingly, "it doesn't matter what [the defendant] thinks." J.A.192. Under that view, it is legally irrelevant if "writing is therapeutic," J.A.329, to "deal with the pain," J.A.205, of a wrenching event by sharing it with those who have voluntarily subscribed to receive a speaker's updates. It is likewise irrelevant if the speaker posts under a pseudonym to distance the views expressed from "the person" of the speaker, J.A.344, posts explicit disclaimers that the writing is not to be taken literally, or includes links to free speech sites to make clear that while the posts involve the intentionally controversial expression of

ideas, they are *only* that—the expression of ideas. The speaker's views are irrelevant, so long as a hypothetical "reasonable person" would view them differently.

That view would subject to prosecution works that have been a staple of Western writing since the curse poems of antiquity. The fantasies of the aggrieved have been a staple of popular culture during most of recorded history. See Judith Evans Grubbs, *Stigmata Aeterna: A Husband's Curse, in* Vertis in Usum: Studies in Honor of Edward Courtney 236-237 (2002). It is unsurprising that such writings are enduring, common, and popular, because they address circumstances that arise frequently, and (cathartic) anger is part of conventional models of grieving. *E.g.*, Jennifer Kromberg, *The 5 Stages of Grieving the End of a Relationship,* Psych. Today, Sept. 11, 2013, http://goo.gl/gxEX3t.

First-person revenge fantasies are such a prevalent theme of blues music as to be cliche.[9] Similar

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[9] See, *e.g.*, Skip James, *.22-20 Blues* (Paramount 1931) ("My baby gets unruly and she don't wanna do/take my .22-20 and I cut her half in two"); Lightnin' Hopkins, *Shotgun Blues* (Aladdin 1950) ("She done put me out of doors/but I even ain't got no home as it goes/Bring me my shotgun/Oh Lord, and a pocketful of shells"); Guy Davis, *Long As You Get It Done, on* Legacy (Red House 2004) ("sharpened up my razor/loaded up my gun/gonna cut you if you stand/gonna shoot you if you run"); Bob Dylan, *Someday Baby, on* Modern Times (Columbia 2006) ("Well, I don't want to brag, but I'm gonna wring your neck/When all else fails I'll make it a matter of self-respect/Someday baby, you ain't gonna worry po' me anymore.")

sentiments are commonplace in rock[10] and country music.[11] But arguably, they have reached their apotheosis in rap music, which has pushed the boundaries of hyperbole. Marshall Mathers, known as "Eminem," recorded several graphic songs addressing his divorce and resulting custody issues with his daughter.

> Don't you get it bitch, no one can hear you
> Now shut the fuck up and get what's coming to you
> You were supposed to love me
> Now bleed bitch, bleed! Bleed bitch, bleed! Bleed![12]
>
> Da-da made a nice bed for mommy at the bottom of the lake

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[10] *E.g.*, Guns 'n Roses, *Used to Love Her*, *on* Lies (Geffen 1988) ("I used to love her but I had to kill her"); Green Day, *Platypus (I Hate You)*, *on* Nimrod (Reprise 1997) ("Red eye, code blue, I'd like to strangle you/and watch your eyes bulge right out of your skull/when you go down head first into the ground/I'll stand above you just to piss on your grave").

[11] Miranda Lambert, *Gunpowder and Lead*, *on* Crazy Ex-Girlfriend (Columbia 2007) ("I'm goin' home, gonna load my shotgun/wait by the door and light a cigarette/he wants a fight, well now he's got one/and he ain't seen me crazy yet"); Dixie Chicks, *Goodbye Earl*, *on* Fly (Sony 1999) ("Those black eyed peas/They tasted alright to me Earl, you're feelin' weak/Why don't you lay down and sleep, Earl/Ain't it dark, wrapped up in that tarp, Earl").

[12] Eminem, *Kim*, *on* The Marshall Mathers LP (Interscope 2000); see also Kevin Gates, *Posed to Be in Love*, *on* By Any Means (Atlantic 2014) ("Passing by your house/like come outside before it get violent/Lights off, mask on, silent.").

> Here, you wanna help da-da tie a rope around this rock? (Yeah!) We'll tie it to her footsie, then we'll roll her off the dock.
> There goes mama, spwashin' in the wa-ta
> No more fightin' wit dad, no more restraining order
> No more step-da-da, no more new brother
> Blow her kisses bye-bye, tell mama you love her.[13]

Popular music likewise commonly features first-person discussion of revenge against police for perceived excesses[14] and senseless violence resulting from frustration.[15]

However hateful or offensive, those songs are entitled to full First Amendment protection. The same protections extend to the efforts of amateurs writing on comparable themes, moved by similar experiences. Cf. J.A.205 ("[T]here's nothing I said [on Facebook] that hasn't been said already."). While private citizens' writings may not rival the output of Bob Dylan, "[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *Stevens*, 559 U.S. at 479-480 (quoting *Cohen* v. *California*, 403 U.S. 15, 25 (1971)); cf. also *State* v. *Skinner*, No. A-57/58-12, slip op. 35

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[13] Eminem, *97 Bonnie and Clyde*, *on* The Slim Shady LP (Interscope 1999).

[14] Body Count, *Cop Killer*, *on* Body Count (Sire 1992) ("Cop killer, better you than me/cop killer/fuck police brutality/cop killer, I know your momma's grieving/cop killer, but tonight we get even").

[15] Drowning Pool, *Bodies*, *on* Sinner (Wind Up 2001) ("Push me again/this is the end* * */let the bodies hit the floor/let the bodies hit the floor").

(N.J. Aug. 4, 2014) ("one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those [writings]"; amateur writers entitled to same protection as professionals).

According to the government, it is irrelevant if Facebook users post song lyrics like those above, or post similar compositions of their own for reasons entirely divorced from any wish to place another person in fear: All that matters is whether a jury would determine that an objective observer would perceive the statement as a threat. That view affords differing degrees of protection to identical words based solely on the identity of the speaker. Thus, Eminem can freely record a fantasy about murdering his ex-wife and disposing of her body with his daughter; another person might lawfully post the song lyrics to Facebook recalling a long-ago custody battle; but if a person posts them because he considers the song a brilliant "parody of [singer] Will Smith's unctuous 'Just the Two of Us'" (about Smith's relationship with his son),[16] he has committed a felony if he is in a souring relationship and, unbeknownst to him, a "reasonable" person would consider the words threatening. Indeed, a negligence standard has the perverse effect of making it increasingly dangerous for a speaker to post on a subject the more strongly he feels about it, and thus poses the risk of deterring people from speaking on the subjects most relevant to them.

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[16] See David Browne, *The Slim Shady LP*, Entertainment Weekly, Mar. 12, 1999, http://goo.gl/Os5c3M.

2. Petitioner's felony conviction for posting a take-off on the Whitest Kids' "It's Illegal" comedy sketch best illustrates the breadth of the negligence standard's chilling effect. Petitioner posted a virtually word-for-word adaptation of a famous sketch that itself parodies speech restrictions. The only violence is, as in the original, completely unrealistic, involving restricted military weapons (a "mortar launcher"), and it ends with notice of a (nonexistent) group meeting using a pass-phrase associated with presidential assassination ("Sic semper tyrannis."). To underscore that it was not meant literally, petitioner hyperlinked the original satire (also, presumably, not meant literally) so that any reader could instantly view it; to demonstrate he intended the post as commentary rather than a threat, he ended the post by saying "Art is about pushing the limits. I'm willing to go to jail for my Constitutional rights. Are you?"

The government investigator, testifying to establish the reaction of a "reasonable person," never bothered clicking the link to watch the original sketch. J.A.75. If petitioner did not foresee she would interpret the post not as commentary on his speech restrictions in the wake of his wife's PFA, but as him "flat out sa[ying] he wanted to kill his wife," J.A.78, that is still enough to support a felony conviction. If that is the law, the only safe course is to say nothing at all.

E. The Negligence Standard Does Not Survive Exacting Scrutiny

Section 875(c)'s imposition of severe criminal penalties irrespective of petitioner's intent is "a stark

example of speech suppression" that fundamentally conflicts with the First Amendment. *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 244 (2002). As a content-based rule, the provision is "presumptively invalid and the government bears the burden to rebut that presumption," *Stevens*, 559 U.S. at 468 (internal quotation marks omitted), by demonstrating that it survives "the most exacting scrutiny." *United States* v. *Eichman*, 496 U.S. 310, 318 (1990). The government has not satisfied that burden.

1. Section 875(c)'s Negligence Standard Is Not The Least Restrictive Means Of Addressing True Threats

Section 875(c)'s negligence standard is unconstitutional because it is "not reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). The government has only given one justification for employing a negligence standard in Section 875(c): "Requiring proof of a subjective intent to threaten would undermine one of the central purposes of prohibiting threats," namely "protect[ing] individuals from the fear of violence and from the disruption that fear engenders." Br. in Opp. 15 (internal quotation marks omitted). A negligence standard is necessary because fear from a statement thought to be a threat "exists regardless of whether the speaker subjectively intended the statement to be innocuous." *Ibid.*

But the government has never demonstrated that jurisdictions that, by constitutional rule or by state law have required proof of subjective intent have systematically failed to protect their citizens as well as

jurisdictions employing the negligence standard, nor sought to demonstrate that speech-neutral steps such as abuse hotlines or improved policing are powerless to address any difference in the liability standard. There is no record of Congress consciously adopting a negligence standard despite its disadvantages, because there is simply no evidence that Congress purposefully adopted that standard; rather, it appears that some court of appeals emphasized the objective element of proving a threat over the subjective one, see pp. 25-26, *supra*, and successive courts simply followed suit.

Nor has the government demonstrated that it will be unable to make cases under a subjective standard. Indeed, times have never been better for the government to prove subjective intent using the defendant's own records, now that most people carry with them "a digital record of nearly every aspect of their lives—from the mundane to the intimate," *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014), and are continually tapping out their innermost thoughts to be eventually subpoenaed. The government has failed completely to prove that its suppression of speech will alleviate the targeted harm "to a material degree," *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 817 (2000), or that "the Government's chosen restriction on the speech at issue be 'actually necessary to achieve its interest.'" *Alvarez*, 132 S. Ct. at 2549 (internal quotation marks omitted).

2. *This Court Has Repeatedly Refused To Sacrifice Speech For Speculative Improvements In Law Enforcement*

More fundamentally, this Court has repeatedly rejected the idea that speech should be sacrificed for hypothetical benefits to law enforcement. Time and again, this Court has struck the balance the way the Constitution itself did, by favoring speech. See *Stevens*, 559 U.S. at 470 ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."). This Court has rejected restrictions on speech even where the government maintained that course would "encourage [molesters'] thoughts and impulses" and "result[] [in] child abuse." The Court insisted on a "significantly stronger, more direct connection" before permitting restrictions on speech. *Free Speech Coalition*, 535 U.S. at 254.

In an increasingly pluralistic society, some offensive speech "must be expected in social interaction and tolerated without legal recourse." 2 Restatement (Third) of the Law Torts § 46, at 138; accord *Snyder* v. *Phelps*, 131 S. Ct. 1207 (2011) ("[S]peech cannot be restricted simply because it is upsetting or arouses contempt."); *Cohen*, 403 U.S. at 25 (1971) ("[T]he State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."). "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Free Speech*

Coalition, 535 U.S. at 255 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973)).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Floor
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

JOHN P. ELWOOD
Counsel of Record
RALPH C. MAYRELL
DMITRY SLAVIN
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

CONOR MCEVILY
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002
(713) 758-2222

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Appendix

APPENDIX

Section 875 of Title 18 of the United States Code provides:

(a) Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

RESPONDENT'S BRIEF

No. 13-983

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. 875(c) requires proof of the defendant's subjective intent to threaten.

2. Whether, by virtue of the First Amendment, proof of a defendant's subjective intent to threaten is required for conviction under Section 875(c).

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Constitution and statutes:

U.S. Const. Amend. I ..... *passim*
Act of May 15, 1939, ch. 133, 53 Stat. 742 26
§ 2, 53 Stat. 744 26
18 U.S.C. 115(a)(1)(B) (1994) 55
18 U.S.C. 871(a) (1964) 20, 40
18 U.S.C. 871(a) 40
18 U.S.C. 875 23
18 U.S.C. 875(b) 23

Statutes—Continued: Page

18 U.S.C. 875(c) ..... *passim*
18 U.S.C. 875(d) 23
18 U.S.C. 1461 (1970) 30
1 John P. Hoyt, The Compiled Laws of the Territory of Arizona 90 (1877) 45
1850 Cal. Stat. 248 45
1867 Colo. Sess. Laws 219 45
18 Del. Laws 450 (1887) 45
1832 Fla. Laws 68 45
1816 Ga. Laws 178 45
1863 Idaho Sess. Laws 463 45
1826 Ill. Laws 145 45
1838 Iowa Acts 161 45
1816 Mich. Territory Laws 128 45
Mo. Rev. Stat. ch. 47, §16 (1844-1845) 45
1864 Mont. Laws 205 45
1795 N.J. Laws 108 45
1858 Neb. Laws 64 45
1885 Nev. Stat. 39 45
1860 Pa. Laws 390 45
Va. Code Ann. § 18.2-423 (1996) 40
1 J.R. Whitehead, Compiled Laws of Wyoming 267 (1876) 45
27 Geo. II, c. 15 (1754) 44

Miscellaneous:

Steve Albrecht, FBI, *Threat Assessment Teams: Workplace & School Violence Prevention* (Feb. 2010), http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/february-2010/threat-assessment-teams 32

Miscellaneous—Continued: Page

2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* (6th ed. 1877) 46

2 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* (1866) 46

Black's Law Dictionary (8th ed. 2004) 24

Blackstone's *Commentaries on the Laws of England* (1765-1769) 46

Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932 (1919) 37

Critical Incident Response Group, FBI, *The School Shooter: A Threat Assessment Perspective* (2000) ... 25, 32

2 Edward Hyde East, *A Treatise of the Pleas of the Crown* (1806) 44

FBI & Department of Homeland Security, *Bomb Threat Guidance* (2013), https://www.llis.dhs.gov/sites/default/files/2013%20BombThreat%20Guidance.pdf 32

H.R. Rep. No. 102, 76th Cong., 1st Sess. (1939) 25, 26

James F. Jarboe, Section Chief, Counterterrorism Div., FBI, Statement before the House Judiciary Comm., Subcomm. on Crime (Nov. 7, 2001) 32

Mac McCann, *Facebook 'Threat' Case Unresolved*, Austin Chronicle (Feb. 28, 2014), http://www.austinchronicle.com/ news/2014-02-28/facebook-threat-case-unresolved. 56

Model Penal Code § 2.02(2)(d) (1985) 29

Graeme R. Newman, *Bomb Threats in Schools* (2011) 38

Stephen Shute, *With and Without Constitutional Restraints*, 1 Buff. Crim. L. Rev. 329 (1998) 46

Miscellaneous—Continued: Page

Threatening Communications: Hearing on H.R. 3230 Before the House Comm. on the Post Office and Post Roads, 76th Cong., 1st Sess. (1939) 23, 26, 27, 29

Webster's New International Dictionary (2d ed. 1958) 24

In the Supreme Court of the United States

No. 13-983

ANTHONY DOUGLAS ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

Section 875(c) of Title 18 of the United States Code provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, peti-

tioner was convicted on four counts of transmitting in interstate commerce a "threat to injure the person of another," in violation of 18 U.S.C. 875(c). Pet. App. 10a. The district court sentenced him to 44 months of imprisonment to be followed by three years of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 1a-29a.

1. Petitioner's convictions in this case are based on a series of messages he posted to the social-networking website Facebook. Facebook is a free service that allows its users to post messages and images to the Internet. J.A. 51-53. Any pair of users may agree to become Facebook "friends," meaning that they generally will have access to each other's posts and will also see each other's new content as part of a live newsfeed. J.A. 51-53, 87-95, 99-100, 103. Petitioner had hundreds of Facebook friends, J.A. 337-338, including many of his coworkers at the amusement park where he was employed, as well as friends and family members of his wife, J.A. 114-116, 150-151. Petitioner made all the posts at issue in this case public, meaning that they would not only be automatically placed in his friends' newsfeeds and be viewable by those friends, but that they would also be accessible to the public at large. J.A. 99-100, 236-237.

a. In May 2010, after his wife moved out of their home with their two young children, petitioner began exhibiting troubling behavior at the amusement park where he worked. Pet. App. 3a. Supervisors sent petitioner home several times after observing him crying with his head down on his desk. *Ibid.* One of the female employees petitioner supervised filed five sexual-harassment complaints against him, including a complaint alleging that he came into the office where

she was working alone late at night and began to undress in front of her. *Ibid.* Petitioner was subsequently fired after his supervisor saw a photograph that petitioner had posted on Facebook. Pet. App. 3a. The photograph, which was captioned "I wish," showed petitioner at the park's "Halloween Haunt," holding a knife to the throat of the woman who had filed the sexual-harassment complaints against him. *Ibid.*; J.A. 340.

Two days after he was fired, petitioner posted additional violent statements to Facebook. Pet. App. 3a. In one post about his former employer, petitioner stated:

> Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the fuckin' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween haunt could be so fuckin' scary?

J.A. 332; see Pet. App. 3a-4a. This and other posts "raised great concern" with park management, particularly in light of the potential for petitioner to sneak into the park, and park security officers were warned about the situation. J.A. 118-124.

b. Petitioner also made Facebook posts about his estranged wife, contacting his wife's sister to ensure that his wife was reading the posts. Pet. App. 4a-7a. In one post, petitioner stated: "If I only knew then what I know now . . . I would have smothered your ass with a pillow. Dumped your body in the back seat. Dropped you off in Toad Creek and made it look like a rape and murder." J.A. 341. And in response to

a post from his wife's sister about shopping for Halloween costumes with petitioner's children, petitioner wrote: "Tell [petitioner's son] he should dress up as Matricide for Halloween. I don't know what his costume would entail though. Maybe [petitioner's wife's] head on a stick? :-p." J.A. 342.

In October 2010, petitioner posted the following:

> There's one way to love ya but a thousand ways to kill ya,
>
> And I'm not gonna rest until your body is a mess,
>
> Soaked in blood and dying from all the little cuts,
>
> Hurry up and die bitch so I can bust this nut,
>
> All over your corpse from atop your shallow grave,
>
> I used to be a nice guy, then you became a slut,
>
> I guess it's not your fault you liked your daddy raped you,
>
> So hurry up and die, bitch, so I can forgive you

J.A. 344; Pet. App. 4a. Around the same time, petitioner also stated on Facebook: "Revenge is a dish that is best served cold with a delicious side of psychological torture." J.A. 355.

c. Based on petitioner's Facebook posts, his wife sought and received a protection-from-abuse order (essentially, a restraining order) against petitioner from a state court. Pet. App. 4a; J.A. 148-150. The order had a duration of three years (the maximum allowed under state law), and the state court also granted petitioner's wife custody of their children. J.A. 149-150. Petitioner attended the state-court hearing, at which his wife testified. J.A. 149. In her testimony, she explained that she had seen his Face-

book posts and had found them to be threatening. J.A. 149, 255.

Shortly after the hearing, friends and family of petitioner's wife informed her that petitioner was still making Facebook posts "about harming [her]." J.A. 151. She thus continued to monitor his Facebook page in order to protect herself and her family from any actions petitioner might take based on his posts. J.A. 151-152, 157. Just three days after the hearing, petitioner posted the following:

> Did you know that it's illegal for me to say I want to kill my wife?
>
> It's illegal.
>
> It's indirect criminal contempt.
>
> It's one of the only sentences that I'm not allowed to say.
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.
>
> I'm not actually saying it.
>
> I'm just letting you know that it's illegal for me to say that.
>
> It's kind of like a public service.
>
> I'm letting you know so that you don't accidently go out and say something like that.
>
> Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.
>
> That's illegal.
>
> Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

It's an incomplete sentence but it may have nothing to do with the sentence before that.

So that's perfectly fine.

Perfectly legal.

I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal.

Yet even more illegal to show an illustrated diagram.

===[__]=====house

::::::::: ^ ::::::::::::cornfield

::::::::::::::::::::::

::::::::::::::::::::::

::::::::::::::::::::::

##########getaway road

Insanely illegal.

Ridiculously, horribly felonious.

Cause they will come to my house in the middle of the night and they will lock me up.

Extremely against the law.

> Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

J.A. 333; see Pet. App. 5a-6a. The post included a link to a YouTube video of a satirical sketch in which a comedian had performed a routine with a script similar to petitioner's post, but involving the President rather than petitioner's wife. J.A. 333: Pet. App. 63a-64a. The post also stated: "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?" J.A. 333. The post—which included an accurate diagram of the house where petitioner's wife and children were staying—made petitioner's wife "fe[el] like I was being stalked" and "fe[el] extremely afraid for mine and my childrens' and my families' lives." J.A. 153; see J.A. 154.

Roughly a week later, petitioner posted the following on his Facebook page:

> Fold up your PFA [protection-from-abuse order] and put it in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> that was improperly granted in the first place
>
> Me thinks the Judge needs an education on true threat jurisprudence
>
> And prison time'll add zeros to my settlement
>
> Which you won't see a lick
>
> cause you suck dog dick in front of children
>
> And if worse comes to worse
>
> I've got enough explosives

> to take care of the State Police and the Sheriff's Department
>
> [link: Freedom of Speech, www.wikipedia.org]

J.A. 334; Pet. App. 7a. This post caused petitioner's wife to be "extremely afraid for [her] life." J.A. 156; see J.A. 158 ("I was just extremely scared."). She explained that even though she "got the protection order to protect myself and my children," petitioner "was still making the threats for everyone to see." J.A. 156.

d. The next day, petitioner posted on Facebook about shooting a kindergarten class:

> That's it, I've had about enough
>
> I'm checking out and making a name for myself
>
> Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined
>
> And hell hath no fury like a crazy man in a Kindergarten class
>
> The only question is . . . which one?

J.A. 335. This post was seen by Federal Bureau of Investigation (FBI) Special Agent Denise Stevens, who had been warned about petitioner by the amusement park and had been monitoring petitioner's public Facebook posts. Pet. App. 7a-8a. After she saw the kindergarten-shooting post, her supervisor notified the local police department, which in turn notified the superintendent of schools. J.A. 84-85.

Agent Stevens and another FBI agent went to petitioner's house to interview him. Pet. App. 8a. When the agents knocked on his door, petitioner's father answered and told the agents that petitioner was

sleeping. *Ibid.* After several minutes, petitioner came to the door wearing a t-shirt and jeans, but no shoes. *Ibid.* Petitioner asked the agents if they were law-enforcement officers and asked if he was free to go. *Ibid.* After the agents identified themselves and told petitioner he was free to go, petitioner went inside and closed the door. *Ibid.*

Later that day, petitioner posted the following on his Facebook page:

> You know your shit's ridiculous
>
> when you have the FBI knockin' at yo' door
>
> Little Agent Lady stood so close
>
> Took all the strength I had not to turn the bitch ghost
>
> Pull my knife, flick my wrist, and slit her throat
>
> Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?
>
> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all go-in'

[BOOM!]

J.A. 336. After reading that post, Agent Stevens "was concerned about [her] family because [she] knew that [petitioner] was computer savvy" and might be able to find out where she lived. J.A. 69. She informed her husband of the situation and took extra precautions around her home. *Ibid.*

2. Petitioner was indicted on five counts of interstate communication of threats, in violation of 18 U.S.C. 875(c). Pet. App. 9a; see J.A. 14-17. Section 875(c) prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." The counts were based on his Facebook posts: Count 1 alleged threats against patrons and employees of the amusement park, J.A. 14-15; Count 2 alleged threats against his wife (both in the post containing the diagram of the house where she was staying and the post asking whether her protection-from-abuse order was "thick enough to stop a bullet"), Pet. App. 5a-7a & n.1; Count 3 alleged threats against local law enforcement (in the post about having "enough explosives to take care of the state police and the sheriff's department"), *id.* at 7a; Count 4 alleged threats against a kindergarten class (in the post about "the most heinous school shooting ever imagined"), *ibid.*; and Count 5 alleged threats against Agent Stevens (in the "Little Agent Lady" post), *id.* at 8a-9a. Petitioner filed a motion to dismiss the indictment, arguing that the First Amendment required the government to prove that he had a subjective intent to threaten in order to convict him for making threats. *Id.* at 9a. The district court denied petitioner's motion, concluding that petitioner's posts constituted

"true threats" that the government could permissibly proscribe. *Id.* at 49a-60a; see *id.* at 9a-10a.

At trial, petitioner claimed that some of his posts were "rap lyrics," *e.g.*, J.A. 204, and noted that some (but not all) made reference to art or free-speech rights, *e.g.*, J.A. 208. Petitioner's wife, however, testified that petitioner had "rarely listened to rap music" and that she "had never seen [him] write rap lyrics during their seven years of marriage." Pet. App. 6a; J.A. 159. She also "explained that the lyric form of the statements did not make her take the threats any less seriously." Pet. App. 6a; J.A. 160. And she observed that statements by petitioner about his willingness to go to jail to vindicate his asserted right to make such posts caused her to take "his threats even more seriously." J.A. 160.

Petitioner asked the district court to instruct the jury that "the government must prove that he intended to communicate a true threat, rather than some other communication." J.A. 21 (emphasis omitted). The court denied that request and instead instructed the jury as follows:

> To constitute a true threat, the statement must communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. This is distinguished from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger.
>
> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates

> the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

J.A. 301.

The district court informed the jury that "[t]he government is not required to prove that the defendant himself intended for the statement to be a true threat." J.A. 302. It subsequently explained, however, that petitioner's "state of mind is relevant in that the test for whether any of the Facebook postings described in the indictment were true threats is an objective test which focuses on what a reasonable person in the position of the defendant as the maker of the statement would expect to be the reaction to the statements." C.A. App. 551 (subsequent portion of final jury instructions relating to certain third-party statements admitted for non-hearsay purposes).

The jury convicted petitioner on Counts 2 through 5 (relating to the threats against his wife, local law enforcement, a kindergarten class, and Agent Stevens) and acquitted him of the charge of threats against the patrons and employees of the amusement park. Pet. App. 10a. The district court denied petitioner's post-trial motions to dismiss the indictment, for a new trial, and to arrest judgment. *Id.* at 10a, 30a-48a. The court sentenced petitioner to 44 months of imprisonment to be followed by three years of supervised release. *Id.* at 10a.

3. The court of appeals affirmed, rejecting petitioner's argument that the district court erred in declining to instruct the jury that it must find that petitioner subjectively intended to threaten harm. Pet. App. 1a-29a. The court of appeals observed that the First Amendment permits criminal punishment for a

communication that qualifies as a "true threat." *Id.* at 11a-13a. The court noted that a "prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 16a (quoting *Virginia* v. *Black*, 538 U.S. 343, 360 (2003)) (brackets in original; internal quotation marks omitted). And the court reasoned that a true-threats test that takes account of "context" and "forces jurors to examine the circumstances in which a statement is made" precludes the possibility of conviction for "protected speech." *Id.* at 20a (quoting *United States* v. *Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), cert. denied, 134 S. Ct. 59 (2013)).

The court of appeals rejected petitioner's argument that this Court's decision in *Virginia* v. *Black*, *supra*, requires proof of a subjective intent to threaten in all threat prosecutions. Pet. App. 13a-21a. The court noted that *Black* had no occasion to consider that question, because the statute at issue in that case, which criminalized cross burning with the intent of intimidating, "already required a subjective intent to intimidate." *Id.* at 15a; see *id.* at 13a. The court also explained that petitioner's interpretation of the holding in *Black* "is inconsistent with the logic animating the true threats exception." *Id.* at 16a.

SUMMARY OF ARGUMENT

Petitioner made true threats that violate Section 875(c). He was aware of the meaning and context of his Facebook posts, and those posts communicated a serious expression of an intent to do harm. Even if petitioner subjectively intended his posts to carry a different meaning, those beliefs did nothing to prevent

or mitigate the substantial fear and disruption that his threats caused. The First Amendment does not require that a person be permitted to inflict those harms based on an unreasonable subjective belief that his words do not mean what they say.

I. Section 875(c) embodies the requirement that the government prove that a defendant made a "true 'threat.'" *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam). A true threat does not include statements that would reasonably be understood as jest, hyperbole, or exaggerated vehemence. *Id.* at 706-708. The statute prohibits only those statements that a reasonable person would interpret as a serious expression of an intent to do harm. In that inquiry, the statements must be "[t]aken in context" and interpreted in light of listener reactions. *Id.* at 708. The context also includes a defendant's own understanding of the meaning of his statements, insofar as it is relevant to how a reasonable person would understand them.

Section 875(c) does not make subjective intent to threaten an element of the offense. The text of Section 875(c), unlike the text of neighboring provisions, does not contain any specific-intent requirement, and prior judicial decisions signaled to Congress that no such requirement would be inferred. The statute's inclusion of the word "threat" means that conviction requires a statement that to a reasonable person communicates an intent to do harm. Neither standard dictionary definitions nor any indicia of congressional intent establish that to constitute a threat, the defendant must have intended to carry out the threat or subjectively intended the threat to be perceived as such. Congress specifically focused on the issue of

mens rea in drafting the statute's text, and its omission of an intent-to-threaten element was deliberate.

Section 875(c)'s mens rea requirement is thus one of general intent: the defendant must have knowingly transmitted the communication containing the threat, understanding the meaning of his words in light of the surrounding circumstances and context. A general-intent requirement is appropriate for a statute that is silent on the issue of mens rea, so long as it is sufficient to preclude a conviction based on facts that the defendant could not reasonably have known. That is true here: a defendant must have knowledge of both the statement and the surrounding context, and such a person is aware of the circumstances that make the statement threatening and create the fear and disruption that Congress sought to prevent.

Petitioner's contention that, as a matter of statutory construction, courts must read in a requirement that a defendant subjectively intend that the communication be perceived as a true threat cannot be reconciled with the approach taken in *Hamling* v. *United States*, 418 U.S. 87, 120-121 (1974). There, the Court rejected any requirement that a defendant charged with the knowing mailing of obscene materials had to know that the materials were obscene. Rather, so long as the defendant knew of the "character" of the materials, it was not necessary that he understand that they were obscene. *Ibid.* Here too, it is sufficient that a defendant knew the meaning and context that made his words a true threat, whether or not he subjectively intended them as such. "The evils that Congress sought to remedy would continue and increase in volume," *ibid.*, if a defendant whose bomb threat led to public fears, evacuations, and investiga-

tions were absolved of criminal liability because a jury could not rule out the possibility that he intended the threat to be taken as a joke.

II. The First Amendment does not require an intent-to-threaten element. True threats have traditionally been treated as a category of unprotected speech. Whatever slight expressive value might be seen in phrasing an idea in the form of a true threat, it is categorically outweighed by the compelling governmental interests in "'protect[ing] individuals from the fear of violence' and 'from the disruption that fear engenders.'" *Virginia* v. *Black*, 538 U.S. 343, 360 (2003) (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992)). A speaker's subjective intention that his statement not be interpreted as a threat, if not made manifest to a reasonable person with knowledge of the context and circumstances, neither increases the expressive value of the statement nor decreases the statement's propensity to cause disruption and harm. A bomb threat that appears to be serious is equally harmful regardless of the speaker's private state of mind. The definition of a constitutionally proscribable threat thus does not turn on the speaker's unexpressed intent.

In *Watts* v. *United States*, *supra*, the Court analyzed whether a statement was a true threat solely by reference to the content of the statement and the objective circumstances in which it was made. *Virginia* v. *Black*, *supra*, upheld Virginia's cross-burning statute by relying on that provision's intent-to-intimidate element. But the Court did not address a general "true threats" statute like Section 875(c) and did not hold that subjective intent is always required. *Black* itself reaffirmed that the basis for governmen-

tal regulation of true threats is the objective harms they create, and nothing in that rationale supports a general requirement of subjective intent. Since colonial times, legislatures in both England and America have enacted statutes proscribing threatening statements irrespective of the speaker's subjective intent to threaten.

Given the standards for finding a true threat, speculative fears about chilling legitimate nonthreatening speech do not justify a constitutional requirement of a subjective intent to threaten. No such requirement applies in criminal prosecutions involving analogous types of unprotected speech that cause harm, such as fighting words and obscenity. The same approach is appropriate here: proper instructions on the standard for identifying a true threat ensure that a prohibition on such threats will reach only a defined class of clearly threatening statements. Juries are fully capable of distinguishing between metaphorical expression of strong emotions and statements that have the clear sinister meaning of a threat. And no evidence supports the speculation that a reasonable-person test, which has been widely applied in criminal prosecutions across the country for decades, chills protected speech or squelches artistic expression.

ARGUMENT

PETITIONER WAS VALIDLY CONVICTED OF MAKING TRUE THREATS WITHOUT THE NEED TO PROVE A SUBJECTIVE INTENT TO THREATEN

This Court has held that "threats of violence are outside the First Amendment," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), and that a legislature accordingly may "ban a 'true threat,'" *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (quoting *Watts* v.

United States, 394 U.S. 705, 708 (1969) (per curiam)). "[A] prohibition on true threats," the Court has explained, "'protects individuals from the fear of violence' and 'from the disruption that fear engenders.'" *Id.* at 360 (quoting *R.A.V.*, 505 U.S. at 388). In enacting 18 U.S.C. 875(c), Congress sought to protect individuals from the fear and disruption that would be caused by the communication of true threats of physical injury.

The disruption and fear caused by a communication that contains a true threat does not depend upon the sender's subjective intent in sending the communication. Such harm will occur whenever the communication is threatening—*i.e.*, when a reasonable person with knowledge of the relevant facts and circumstances would interpret the communication as a serious expression of an intent to do harm. Persons who receive the statement must act on its meaning and are placed in fear and forced to take precautions, regardless of whether the speaker may subjectively and unreasonably intend the statement as emotional venting or artistic expression. Accordingly, neither Section 875(c) nor the First Amendment requires proof that a sender who is aware of the meaning, context, and circumstances of his threat subjectively intend it to be perceived as threatening.

I. SUBJECTIVE INTENT TO THREATEN IS NOT AN ELEMENT OF THE OFFENSE DEFINED IN 18 U.S.C. 875(c)

Section 875(c) prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." The statute reaches only true threats, requires only general intent to make

the threatening statement, and contains no implicit subjective intent-to-threaten element.

A. Section 875(c) Prohibits A Narrow Class Of Communications That Contain True Threats

Like other statutes that target threatening communications, Section 875(c) reaches only "true 'threat[s],'"; it does not reach jest, "political hyperbole," or "vehement," "caustic," or "unpleasantly sharp attacks" that fall short of serious expressions of an intent to do harm. *Watts*, 394 U.S. at 706-708 (citation omitted).

A statement can be found to be a true threat in a criminal case only if the jury finds beyond a reasonable doubt that a reasonable person "would" understand the statement to convey "a serious expression of an intention to inflict bodily injury or take the life of an individual." J.A. 301-302; see, *e.g.*, *United States* v. *White*, 670 F.3d 498, 507 (4th Cir. 2012) (test focuses on how statement "would" reasonably be interpreted); *United States* v. *Mabie*, 663 F.3d 322, 330 (8th Cir. 2011) (same), cert. denied, 133 S. Ct. 107 (2012); *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir.) (same), cert. denied, 546 U.S. 980 (2005). The mere possibility that a reasonable person could conceivably have interpreted the statement as a true threat does not suffice for conviction.[1]

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[1] The instructions in this case framed the inquiry as how "a reasonable person" making the statement "would foresee that the statement would be interpreted by those to whom the maker communicates the statement." J.A. 301. Some courts of appeals articulate the inquiry by reference to a "reasonable recipient" or a "'reasonable person' familiar with all the circumstances," rather than a reasonable speaker. *White*, 670 F.3d at 510 (citing cases). Petitioner does not challenge the district court's specific articula-

The determination of whether a statement constitutes a true threat always takes account of context. *White*, 670 F.3d at 506 (reasonable-person test presumes "familiar[ity] with the context of the communication") (citation omitted); *United States* v. *Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (same); *Stewart*, 411 F.3d at 828 (reasonable-person test looks to "context" and "circumstances") (citation omitted). In *Watts*, for example, the Court held that a statement at political rally, in which a speaker who had received a draft notice stated that, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," in response to which the audience laughed, had not made a true threat against the President, punishable under 18 U.S.C. 871(a) (1964). 394 U.S. at 706-708; see also J.A. 301 (jury instructions here distinguished a true threat "from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger"). Consistent with *Watts*, the jury should, as the district court explained here, consider "the circumstances under which the statement was made," "the context within which the statement was made," "the effect on the listener or reader of the statement," and "whether the statements were conditional, or whether they specified the precise date, time or place for carrying out an alleged threat." J.A. 302.

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tion of the reasonable-person standard, and courts have regarded the different articulations as "largely academic." *Doe* v. *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622-623 (8th Cir. 2002) (en banc); see also *Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coal. of Life Activists*, 290 F.3d 1058, 1075 n.7 (9th Cir. 2002) (en banc) (observing that different articulations "do[] not appear to matter much"), cert. denied, 539 U.S. 958 (2003).

A defendant is always free to explain his intention in making a particular statement, and a jury must weigh the defendant's explanation of his intent in determining how a reasonable person would understand the remarks, in context. See C.A. App. 551. A speaker may be in a good position to shed light on features of the context of his remarks or particular words spoken that explain why they should not be taken seriously. For example, petitioner testified at length, without objection, about his intent in making the statements at issue, pointing to features of Facebook that he regarded as negating their natural meaning. See generally, *e.g.*, J.A. 198-236.[2] What a speaker's unexpressed intent cannot do, however, is convert statements that a reasonable person would understand as threatening, in context, into innocuous statements or merely letting off steam.

B. Subjective Intent To Threaten Is Not A Statutory Element Of A Section 875(c) Offense

Section 875(c) does not contain an express mental element, but background principles of criminal law establish that it requires a mens rea of general intent: the maker of the threat must understand the meaning

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[2] Petitioner suggests that the government's view of the true-threat test renders it irrelevant to consider the purpose, audience, and immediate or larger context of his Facebook posts. See, *e.g.*, Pet. Br. 46 (quoting government's closing argument), 52-53 (same). That is incorrect. The parties are free to make arguments about the *significance* of those matters in assessing whether statements constitute a true threat—and it is permissible for the government to argue that what the defendant intended does not alter the reality of what he said. But those matters are unquestionably relevant to the ultimate issue of whether the statements, in context, constitute true threats.

of the words he speaks, in context, and must intentionally speak them. See, *e.g.*, *Ragansky* v. *United States*, 253 F. 643, 645 (7th Cir. 1918) (interpreting 18 U.S.C. 871); accord *Pierce* v. *United States*, 365 F.2d 292, 294 (10th Cir. 1966). Sending a threatening communication with such knowledge does not become legal simply based on the defendant's subjective desire that the communication be interpreted as, for example, a purely theoretical "revenge fantas[y]" (Pet. Br. 22), or as a "joke" (*id.* at 51).

1. The text of Section 875(c) does not require proof of a subjective intent to threaten

The analysis of a statute's mens rea requirement, as with any other question of statutory interpretation, "begin[s] by examining the text." *Carter* v. *United States*, 530 U.S. 255, 271 (2000). Here, the text of Section 875(c) does not contain a mens rea element, and it is appropriate to infer a requirement of general intent. See pp. 28-35, *infra*. But the absence of any reference to a subjective intent to threaten makes it inappropriate to read such a specific-intent element into the statute. See *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (declining to read a statute whose text "d[id] not include an 'intent to defraud' state of mind requirement" to require such intent, observing that "we ordinarily resist reading words or elements into a statute that do not appear on its face").

The absence of an explicit intent requirement from the text of Section 875(c) contrasts tellingly with the inclusion of such requirements in other anti-threat prohibitions. As petitioner acknowledges (Br. 33), neighboring subsections of Section 875, which also prohibit certain types of threats, do expressly "include textual specific intent requirements." See 18 U.S.C.

875(b) (proscribing certain threats made "with intent to extort"), 875(d) (similar). Although the specific-intent requirement petitioner would graft onto Section 875(c) (intent to threaten) differs from the specific-intent requirements set forth in the neighboring provisions (intent to extort), "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks, brackets, and citation omitted); see *Bates*, 522 U.S. at 29-30 (same). Given Congress's practice of setting forth specific-intent requirements explicitly in Section 875, it is unlikely to have intended such a requirement in Section 875(c) without saying so.

It is also significant that Congress drafted the original version of what is now Section 875(c) against a statutory backdrop that included a provision prohibiting "knowingly and willfully" making threats against the President. *Threatening Communications: Hearing on H.R. 3230 Before the House Comm. on the Post Office and Post Roads*, 76th Cong., 1st Sess. 13 (1939) (mentioning the presidential-threat statute) (statement of Rep. Sweeney) (*1939 Hearing*). Courts had interpreted that statute not to require proof of a specific intent to threaten, but instead to require only that a speaker "comprehend[] the meaning of his words" and "voluntarily and intentionally utter[] them as the declaration of an *apparent* determination to carry them into execution." *Ragansky*, 253 F. at 645 (emphasis added). In light of Congress's presumptive awareness of that interpretation, see *Lorillard* v.

Pons, 434 U.S. 575, 580 (1978), it would be anomalous to interpret Section 875(c), which does not even explicitly require knowledge or willfulness, to nevertheless require proof of the greater mental state of an intent to threaten.

Petitioner asserts (Br. 22-24) that the word "threat" in Section 875(c) in itself refers only to statements that the speaker subjectively intends to be interpreted as threatening. See also *United States* v. *Jeffries*, 692 F.3d 473, 483-484 (6th Cir. 2012) (Sutton, J., dubitante), cert. denied, 134 S. Ct. 59 (2013). But the dictionary definitions of "threat" or "threaten" that petitioner provides do not support that assertion. A "threat" is defined as "an expression of an intention to inflict loss or harm on another by illegal means," *Webster's New International Dictionary* 2633 (2d ed. 1958), or "[a] communicated intent to inflict harm or loss on another," Pet. Br. 23 (quoting *Black's Law Dictionary* 1519 (8th ed. 2004)). To the extent that these definitions refer to intent, they describe an intent different from the type advocated by petitioner: an intent to carry out an act (the infliction of loss or harm), not an "intent to cause fear" (Pet. Br. 19). Petitioner did not request a jury instruction on the former type of intent; the existence of a requirement to prove such intent is not encompassed within the questions presented, see Pet. Br. i (referring to the "subjective intent to threaten"); and the Court has made clear that such intent is not part of the constitutional definition of a "threat," see *Black*, 538 U.S. at 359-360 (recognizing that a statement can be a "threat" even if the speaker has no intent to carry out the harm that it threatens).

In any event, the definitions point to the character of the communication—the threats must be believable in order to put a person in fear—but do not shed light on the actual intent of the speaker in a prosecution under Section 875(c) for making the threat. The definitions describe the *message* that is "express[ed]" or "communicated." Accordingly, they refer to words that convey an apparent intent to inflict harm, not to a subjective, unexpressed intent of the speaker. The recipient of a letter that says "I will kill you" will describe himself as having "received a threat in the mail," even if the recipient has no idea who the sender was, whether the sender in fact planned to commit murder, or how the sender intended the letter to be interpreted. See Critical Incident Response Group, FBI, *The School Shooter: A Threat Assessment Perspective* 29 (2000) (*School Shooter*) (describing an anonymous call about a pipe bomb in a school as a "High-Level Threat"). Similarly, a letter stating that "[a]s soon as I get off the bus in Providence * * *, I will kill the judges who directed the state police to frame me," *United States* v. *D'Amario*, 350 F.3d 348, 352 (3d Cir. 2003), is a threat, even if the sender secretly means the statement to be construed as an emotional release or a figurative protest against a government conspiracy.

2. Section 875(c)'s origins and purpose confirm that subjective intent to threaten is not required

Before 1939, federal law prohibited the sending of threats in interstate commerce only when the sender intended to extort something of value from the recipient. H.R. Rep. No. 102, 76th Cong., 1st Sess. 1 (1939) (1939 House Report). The Department of Justice urged Congress to supplement the existing statutes in

order, *inter alia*, "to render present law more flexible." *1939 Hearing* 5 (statement of William W. Barron, Criminal Division, Department of Justice). The Department informed Congress that "a number of threats of a very serious and socially harmful character [are] not covered by the existing law for the reason that the sender of the threat did not intend to extort money or other thing of value for himself." 1939 House Report 1; see *id.* at 2 (reproducing Attorney General's letter stating that a "threat may be of a dangerous or vicious character" even if intent to extort is absent).

At a hearing on legislation based on the Department's proposal, Members of Congress expressed concern about, for example, people who send threatening letters to legislators or "a mentally irresponsible fellow who might send a threatening letter to a judge." *1939 Hearing* 7-8 (statements of Reps. Sweeney and Mitchell). Congress addressed the deficiencies in the preexisting statutes by enacting a much broader prohibition of harmful threats. See Act of May 15, 1939, ch. 133, 53 Stat. 742. The new law included Section 875(c)'s predecessor, which prohibited "transmit[ting] in interstate commerce by any means whatsoever any communication containing any threat to kidnap any person or any threat to injure the person of another." § 2, 53 Stat. 744.

Although petitioner asserts (Br. 25) that "Congress gave no hint that it meant to write subjective intent out of the statute," he disregards "the most reliable evidence of [congressional] intent," namely, the "language of the statute[] that [Congress] enact[ed]," *Holloway* v. *United States*, 526 U.S. 1, 6 (1999), which contains no mention of an intent to threaten. And

given that the very reason for the legislation was the undue narrowness of the existing specific-intent requirement for threat prosecutions, Congress's omission of any specific-intent element from the new law is the best evidence of its purpose *not* to require one. Congress was not required to confirm its intention in the legislative history. See *Carter*, 530 U.S. at 270-271; *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.").

In any event, Congress had ample reason to know that Section 875(c)'s predecessor would be interpreted not to require specific intent to threaten. Referring to another provision of the proposed bill, which prohibited "knowingly" mailing a certain type of threat, a Department of Justice representative testified that "[s]uch a threat, unaccompanied by a provable purpose, should nevertheless be punished." *1939 Hearing* 5-6; see *id.* at 1 (Section 1(b) of proposed bill). It is implausible that Congress could understand that a provision that proscribed "knowingly" mailing a threat did not require a purpose to threaten, yet understand Section 875(c)'s predecessor (which did not even contain the word "knowing") to require an even higher mens rea. See also *1939 Hearing* 22-23 (testimony of Department representative clarifying that Section 3(a) of proposed bill, concerning ransom demands, would require proof that the defendant was "connected with or had knowledge and an intent to help carry out the scheme involved," but not expressly including such a qualification when reciting text of Section 875(c)'s predecessor).

3. Section 875(c) defines a general-intent offense

a. Section 875(c)'s silence on the issue of the required mens rea does not mean that the statute has no mens rea element at all. As petitioner observes (Br. 26-29), "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436-437 (1978)). Accordingly, this Court has applied a "presumption in favor of scienter," under which it has generally "'interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.'" *Carter*, 530 U.S. at 267-268 (quoting *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)).

The presumption in favor of scienter, however, "requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter*, 530 U.S. at 269 (quoting *X-Citement Video*, 513 U.S. at 72). Typically, that is satisfied simply by "requiring proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime." *Id.* at 268; see *Staples*, 511 U.S. at 605 (explaining that the "conventional *mens rea* element" for a statute silent on that point is one that "would require that the defendant know the facts that make his conduct illegal"); *United States* v. *Bailey*, 444 U.S. 394, 408 (1980) ("[T]he cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction.").

Here, a showing that the defendant acted "knowingly" in transmitting a true threat requires proof that the defendant knew that he transmitted a communication and that he comprehended its contents and context. "[A] foreigner, ignorant of the English language," would not have knowingly made a threat by posting petitioner's communications. *Ragansky*, 253 F. at 645. Nor would a person knowingly transmit a threat by mailing a sealed letter containing a bomb threat without knowing the letter's contents and context. Cf. *1939 Hearing* 20-23 (discussing potential safeguards against liability for common carriers). Petitioner is therefore incorrect that the statute would penalize "simple negligence," Br. 32 (emphasis omitted), such that a defendant could be punished merely because he "*should* [have been] aware" of a particular circumstance. Model Penal Code § 2.02(2)(d) (1985) (emphasis added). Like the mens rea requirements adopted in the cases on which petitioner relies, a general-intent requirement in Section 875(c) precludes conviction based on a fact that was beyond the defendant's awareness. See *X-Citement Video*, 513 U.S. at 73 (knowledge of age of persons depicted in sexually explicit materials); *Staples*, 511 U.S. at 614-615 (knowledge of internal workings of firearm); *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 524 (1994) (knowledge that products are likely to be used with illegal drugs); *Liparota* v. *United States*, 471 U.S. 419, 425-427 (1985) (knowledge that manner of food-stamp use was unlawful, where lawfulness could depend on the independent actions of third parties); *United States Gypsum Co.*, 438 U.S. at 444 (knowledge that conduct would likely produce anticompetitive effects); *Morissette* v. *United States*, 342 U.S. 246,

271 (1952) (knowledge that property belonged to someone else).

b. Petitioner's argument for a more exacting mens rea as a matter of implied congressional intent cannot be reconciled with the approach taken by this Court in *Hamling* v. *United States*, 418 U.S. 87 (1974). The defendants in *Hamling* were convicted under a federal statute that prohibited "knowingly" sending "obscene, lewd, lascivious, indecent, filthy or vile" material through the mail. *Id.* at 98 n.8 (quoting 18 U.S.C. 1461 (1970)); see *id.* at 91. This Court affirmed the conviction, approving of the district court's instruction to the jury that the defendants' "belief as to the obscenity or non-obscenity of the materials [was] irrelevant" and that the government needed only to prove that the defendants had knowledge of the mailing and "the character of the materials." *Id.* at 119-120; see *id.* at 119-124, 140. Accordingly, while the determination of whether the materials were obscene turned on a jury's application of community standards, *id.* at 98-103, the prosecution was not required, as either a statutory or constitutional matter, to "prove a defendant's knowledge" that the materials were obscene, *id.* at 121 (emphasis added), let alone his intent that the materials be perceived as obscene. His knowledge of the character of the materials—analogous to the content and context of the true threat at issue here—was enough.

The Court's approval of a general-intent requirement in *Hamling* reflects a general principle of statutory construction. See, *e.g.*, *Posters 'N' Things*, 511 U.S. at 524-525 (relying on *Hamling* in holding that statute proscribing sale of drug paraphernalia did not require proof defendant specifically knew the items

qualified as such). And that approach applies with particular force to rebut petitioner's claim that a requirement to prove subjective intent must be implied here. In *Hamling*, as here, the relevant statute regulated expressive activity. And in *Hamling*, as here, the relevant statute defined the expressive activity by use of terminology ("obscene" or "threat") with a specific legal meaning that a jury would apply to the particular facts. See pp. 48-49, *infra* (discussing Court's obscenity jurisprudence). Notwithstanding the obscenity statute's explicit requirement that the offense be committed "knowingly," the Court declined to hold that the defendant must know that the materials he distributed were legally obscene. Put another way, if the defendant's view differed from that of a reasonable jury, the defendant's actions were still performed with the requisite knowledge to support his conviction.

The Court had sound reason for declining to allow the defendant's beliefs in *Hamling* to control. As the Court explained, "[t]he evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated." 418 U.S. at 120-121 (quoting *Rosen* v. *United States*, 161 U.S. 29, 41-42 (1896)). Similar logic applies equally here. If interpreted to include the mens rea requirement suggested by petitioner, Section 875(c) would not, for example, prohibit mailing anthrax threats to public officials, so long as the sender intended those threats to be interpreted as a hoax. Cf., *e.g.*, *United States* v. *Davila*, 461 F.3d 298, 300 (2d Cir. 2006), cert. denied,

549 U.S. 1266 (2007); *State* v. *Lujan*, 911 P.2d 562, 568 (Ariz. Ct. App. 1995).

Indeed, on petitioner's view, such threats would not be covered *even if* the sender was aware of (but disregarded) the likelihood that the letters would be taken seriously and thereby cause substantial individual fear, a massive official response, and major public disruptions (such as evacuating potential victims, enhancing security, or shuttering government facilities). Recipients of threats, and the authorities charged with protecting them, will react to threats based on the information they have, which will not include the actual subjective intent of the person who communicated the threat. As the FBI's section chief for counterterrorism has explained with respect to bioterrorism threats, the "response to an actual threat or one that is later determined to be not credible, or a hoax, is indistinguishable." James F. Jarboe, Section Chief, Counterterrorism Div., FBI, Statement before the House Judiciary Comm., Subcomm. on Crime (Nov. 7, 2001); see also, *e.g.*, *School Shooter* 6-14 (discussing evaluation, assessment, and investigation of threats against schools); FBI & Department of Homeland Security, *Bomb Threat Guidance* (2013), https://www.llis.dhs.gov/sites/default/files/2013%20BombThreat%20Guidance.pdf (similar for bomb threats); Steve Albrecht, FBI, *Threat Assessment Teams: Workplace & School Violence Prevention* (Feb. 2010), http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/february-2010/threat-assessment-teams (explaining that threat assessment teams "aim to assess dangerousness, not to predict violence; only perpetrators ultimately know their intentions"). Petitioner's posts, for example, instilled fear not only in petitioner's wife, but also an FBI agent. Congress

could not have intended to immunize defendants whose actions lead to such substantial harms based on their subjective beliefs at odds with reality.

Petitioner's position would also make it more difficult to convict defendants who cause such harms. If Section 875(c) in fact required proof of specific intent, a defendant might avoid conviction by arguing that he was voluntarily intoxicated, or had some other form of diminished capacity that he claims prevented him from forming the requisite intent, when he made the threats. See *United States* v. *Darby*, 37 F.3d 1059, 1064 (4th Cir. 1994), cert. denied, 514 U.S. 1097 (1995); see also, *e.g.*, *United States* v. *Christian*, 749 F.3d 806, 810-814 (9th Cir. 2014) (permitting diminished-capacity defense to charge involving threats against law-enforcement officials). Or a clever defendant could, for example, style a Facebook post announcing that it will be "gun locker time" if a particular state judge "mess[es] with" him, cf. *State* v. *Side*, 21 P.3d 321 (Wash. Ct. App. 2001), as rap lyrics, in the hopes that a future jury, even if convinced of the objectively threatening nature of the statement, would have reasonable doubt as to whether it might have been intended simply as artistic emotional venting. See *United States* v. *Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997) (stating that "specific intent * * * by its nature, is difficult to demonstrate").

c. Petitioner's additional statutory arguments lack merit. First, petitioner contends (Br. 25-26) that courts of appeals in the 1960s and 1970s interpreted Section 875(c) to require proof of intent. But several of those decisions are unclear about whether the necessary "intent" is specific or general; they are largely unreasoned and address the issue only in passing; and

they merit little weight in determining congressional intent, particularly because, as petitioner himself recognizes (Br. 26), most circuits now interpret Section 875(c) not to require an intent to threaten. See, *e.g.*, *Darby*, 37 F.3d at 1065-1066 (directly considering the issue, holding that intent to threaten is not required, and treating *United States* v. *Dutsch*, 357 F.2d 331 (4th Cir. 1966), on which petitioner relies (Br. 25), as dictum).

Second, petitioner attempts (Br. 32-33) to draw analogies between Section 875(c) and the tort scheme for compensating the infliction of emotional distress. He provides no basis for assuming that Congress had the tort system, which is directed towards compensation of private harms, in mind when it enacted Section 875(c), which protects against not only private harm but also public disruption. And limitations on tort recovery for infliction of emotional distress, which stem in large part from concern about allowing plaintiffs to recover for imagined or exaggerated psychological harms, see *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 546 (1994), have little relevance to the interpretation of a criminal threat prohibition like Section 875(c).

Finally, petitioner's invocation (Br. 30-32) of the canon of constitutional avoidance is unsound. That canon is a "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). It is not, however, a tool for crafting a specific-intent requirement unsupported by the text, legislative history, or other statutory-interpretation tools. See *id.*

at 385 ("The canon * * * comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."). Nor is it a device for substituting views about the First Amendment for the inquiry into what conduct Congress considered wrongful. See *United States* v. *Apel*, 134 S. Ct. 1144, 1153 (2014) ("The canon is not a method of adjudicating constitutional questions by other means.") (citation omitted).

II. THE FIRST AMENDMENT DOES NOT REQUIRE PROOF OF SUBJECTIVE INTENT TO THREATEN

True threats, whether or not subjectively intended as such, lie "outside the First Amendment," *R.A.V.*, 505 U.S. at 388. That is because the harms that true threats inflict—fear and disruption (*ibid.*)—take place regardless of the speaker's unexpressed intention. A rigorous application of true-threat doctrine to persons who understand the meaning and context of their statements creates no serious risk of chilling protected activity, as experience has shown in the great majority of circuits that have long followed the approach taken in this case. The government's authority to "ban a 'true threat,'" *Black*, 538 U.S. at 359 (citation omitted), thus does not and should not depend on the speaker's private state of mind.

A. The Rationales For Treating True Threats As Unprotected Speech Apply Equally To All True Threats, Regardless Of A Speaker's Intent

This Court has repeatedly recognized that "[t]he protections afforded by the First Amendment * * * are not absolute." *Black*, 538 U.S. at 358; see, *e.g.*, *R.A.V.*, 505 U.S. at 382-384; *Chaplinksy* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942). "'[T]he

freedom of speech' referred to by the First Amendment does not include a freedom to disregard * * * traditional limitations" on certain categories of "'unprotected speech.'" *R.A.V.*, 505 U.S. at 383, 384 n.4; see, *e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010). "True threats" are one of those categories, "the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinksy*, 315 U.S. at 571-572; see *Black*, 538 U.S. at 359; see also *R.A.V.*, 505 U.S. at 388; *Watts*, 394 U.S. at 707.

A reasonable-person test for true threats follows logically from the reasons that justify classifying true threats as unprotected speech. The Court has recognized that statements falling within the traditional categories of unprotected speech have been deemed "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V.*, 505 U.S. at 383 (quoting *Chaplinksy*, 315 U.S. at 572). In the case of true threats, that categorical balancing leaves no room for the argument that the category should be defined by reference to the speaker's subjective intent.

A statement that is threatening to a reasonable person has little legitimate expressive value. Although statements categorized as unprotected speech cannot be said to "constitute '*no* part of the expression of ideas,' * * * they constitute 'no *essential* part of any exposition of ideas.'" *R.A.V.*, 505 U.S. at 385 (quoting *Chaplinsky*, 315 U.S. at 572). A legitimate contribution to the social discourse gains little, if anything, from its expression in the form of a statement that a reasonable person would understand as a seri-

ous expression of an intent to injure or kill someone. The expression of a serious intent to cause someone physical injury does not invite further debate, cannot be rebutted by the listener, and substitutes the specter of violence for the free exchange of ideas. Any *non*threatening idea that the speaker means to communicate can be phrased in a different way, with little or no loss of communicative value.

Although the First Amendment would not normally impose constraints on how a speaker articulates an idea, the serious harms associated with threatening statements permit legislatures to eliminate such statements as a "mode of speech." *R.A.V.*, 505 U.S. at 386 (quoting *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in the result)). Thus, to the extent that a threatening statement "can be used to convey an idea," *ibid.*, the traditional classification of threats as unprotected speech reflects a categorical judgment that the speaker's right to express an idea in that way is secondary to the recipient's (and society's) right not to be subjected to the "fear" and "disruption" that the threat will produce, *Black*, 538 U.S. at 360 (quoting *R.A.V.*, 505 U.S. at 388). Where the natural effect of speech, as understood by a reasonable listener with knowledge of the circumstances, would lead someone to "fe[el] extremely afraid for mine and my childrens' and my families' lives," J.A. 153, a legislature may permissibly declare it to be off-limits. See Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins.").

This categorical judgment applies equally to all statements that a reasonable person would interpret

as a threat, regardless of the subjective intent of the speaker. If two people were to make the same Facebook post under identical circumstances, and the content and context of the post were such that a reasonable person would understand it to communicate a serious intent to cause injury, the considerations that justify governmental regulation would be the same, even if one speaker privately intended the post as a threat while the other privately intended it to be taken as a joke. Because any difference in the speakers' purposes was not communicated to a listener with knowledge of the circumstances, both the expressive value of the speech and the harms invited by the speech would be identical in each case. Yet under a "test focused on the speaker's intent," the post would be treated as "protected speech for one speaker, while leading to criminal penalties for another." *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J.). Such a "bizarre result," *ibid.*, cannot be squared with the reasons why true-threat bans are permitted in the first place. A bomb threat is harmful, and a legitimate subject of criminal regulation, regardless of the speaker's intent. See, *e.g.*, Graeme R. Newman, *Bomb Threats in Schools* 11 (2011) (federal government publication noting that although "90 percent of bomb threats are hoaxes," the "disruption caused by bomb threats is considerable whether the bomb is real or not" because "all such threats are often responded to on the assumption that a real bomb does exist").

Although petitioner does not dispute that the Court has recognized "true threats" as a category of historically unprotected speech, he nevertheless suggests (Br. 57-61) that the Court subject the regulation of

true threats without proof of subjective intent to "the most exacting scrutiny," Br. 58 (quoting *United States* v. *Eichman*, 496 U.S. 310, 318 (1990)), by weighing the strength of governmental interests and scrutinizing the narrowness of the means. That suggestion conflicts with the treatment of true threats as a category of speech that has historically lacked constitutional protection because of the propensity of such statements to create fear and disruption—results that are not ameliorated by a defendant's unexpressed intent. In any event, a restriction on true threats without regard to subjective intent would "serve a compelling state interest and [be] narrowly drawn to achieve that end." *Boos* v. *Barry*, 485 U.S. 312, 321 (1988) (citation omitted). The government has a compelling interest in eliminating fear and disruption, particularly when the government must respond by investigating the speaker and taking steps to protect against possible violent crimes against innocent people. And, as just explained, defining true threats by reference to the speaker's intent would weaken, not strengthen, the fit between the true-threat ban and the compelling interests it serves.

B. Both Precedent and History Demonstrate That True Threats May Be Proscribed Without Requiring Proof Of Subjective Intent To Threaten

The judicial and historical precedents reveal that a legislature's authority to protect its citizens from the fear and disruption caused by true threats does not require the government to establish, beyond a reasonable doubt, the private and unexpressed intent of the speaker.

1. In *Watts* v. *United States*, *supra*, the Court reviewed a conviction under 18 U.S.C. 871(a), which

prohibited "knowingly and willfully . . . [making] any threat" to injure or kill the President. 394 U.S. at 705 (quoting 18 U.S.C. 871(a) (1964)) (brackets in original). Interpreting the statute "with the commands of the First Amendment clearly in mind," the Court held that the statute "requires the Government to prove a true 'threat,'" a category that the Court "distinguished from * * * constitutionally protected speech." *Id.* at 707-708 (internal quotation marks and citation omitted). The Court then analyzed whether the defendant in the case had in fact made a true threat. *Id.* at 708. In concluding that he had not, the Court looked to the statement's "context," its "expressly conditional nature," and "the reaction of the listeners." *Ibid.* The Court did not look to the speaker's subjective intent to threaten.[3]

In *Virginia* v. *Black*, *supra*, the Court held that a Virginia statute banning cross-burnings with "an intent to intimidate a person or group of persons" was not impermissibly content-based. 538 U.S. at 347 (quoting Va. Code Ann. § 18.2-423 (1996)); see *id.* at 360-363. The Court reaffirmed that "the First Amendment * * * permits a State to ban a 'true threat,'" *id.* at 359, and explained that Virginia's prohibition regulated a type of unprotected speech particularly "likely to inspire fear of bodily harm." *Id.* at

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[3] As petitioner observes (Br. 35-36), the Court did reserve the question "whether or not the 'willfullness' requirement of the statute implied that a defendant must have intended to carry out his 'threat.'" *Watts*, 394 U.S. at 707; see *id.* at 707-708. As a matter of First Amendment law, however, the Court has subsequently clarified that a "speaker need not actually intend to carry out [a] threat" in order for a statement to qualify as a "true threat." *Black*, 538 U.S. at 359-360.

362-363. A plurality of the Court concluded, however, that the statute's presumption that the burning of a cross was "prima facie evidence of an intent to intimidate," as interpreted by the jury instructions given in Black's case, rendered the statute unconstitutional. *Id.* at 363-367 (plurality opinion). The plurality reasoned that because some cross-burnings may be protected "political speech" rather than "constitutionally proscribable intimidation," the statute as interpreted through the jury instructions "strips away the very reason why a State may ban cross burning with an intent to intimidate." *Id.* at 365.

Contrary to petitioner's suggestion (Br. 43-45), *Black* did not address, much less resolve, the question whether a speaker must have a subjective intent to threaten before his communication will be deemed a true threat. The Court's observation in *Black* that "'[t]rue threats' *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359 (emphasis added), and that a statement made "with the intent of placing the victim in fear of bodily harm or death" is a "*type* of true threat," *id.* at 360 (emphasis added), did not state or imply that the category of true threats is limited to such statements. The Court stated only that the category *includes* such statements. And because the Virginia statute at issue banned only a particular type of intimidation (itself only a subset of true threats), and expressly required an intent to intimidate, the Court had no occasion to consider whether a legislature's constitutional authority to ban true threats is defined by a speaker's subjective intent. See, *e.g.*, *Jeffries*, 692 F.3d at 479 (explaining that *Black* "says

nothing about imposing a subjective standard on other threat-prohibiting statutes, and indeed had no occasion to do so"); *id.* at 480-481 (noting agreement of other circuits); but see, *e.g.*, *United States* v. *Heineman*, No. 13-4043, 2014 WL 4548863, at *4-*8 (10th Cir. Sept. 15, 2014) (rejecting that view and noting Ninth Circuit's agreement).

Although *Black* did not address the issue, *Black*'s explanation of the reasons why legislatures may ban true threats supports the conclusion that their authority to do so does not depend on a speaker's subjective intent. The Court identified three governmental interests that "a prohibition on true threats" would serve: protecting individuals "from the possibility that the threatened violence will occur," protecting individuals "from the fear of violence," and protecting individuals "from the disruption that fear engenders." *Black*, 538 U.S. at 360 (quoting *R.A.V.*, 505 U.S. at 388). The Court clarified that a true-threat ban need not promote the first of these interests (protection from the possibility of violence) in order to be constitutional, explaining that a "speaker need not actually intend to carry out [a] threat" in order for the legislature to prohibit it. *Ibid.* And the remaining interests (protection from the fear and disruption that threats cause) do not depend in any way on the speaker's subjective intent. As previously discussed, a statement that a reasonable person would understand as expressing a serious intent to do harm will create fear and disruption whatever the speaker's private state of mind.

Petitioner also errs (Br. 44-45) in inferring the existence of a constitutional subjective-intent requirement from *Black*'s invalidation of the prima-facie-

evidence provision. Virginia law, as interpreted by the jury instructions in Black's case, provided that the act of cross-burning was prima facie evidence that sufficed to support a finding of an intent to intimidate. The plurality reasoned that, because cross-burning *can* have a protected political meaning, a ban on that activity must exclude its protected forms from prosecution, and Virginia's method to achieve that goal was to single out cross-burners who intend to intimidate. See 538 U.S. at 365-366 (plurality opinion); see also *id.* at 385-386 (Souter, J., concurring in the judgment in part and dissenting in part). But because the prima facie evidence provision effectively eliminated the statute's requirement to prove intent, a defendant could be convicted for burning a cross in the context of a movie, a play, or other situation in which a reasonable observer would have understood it not to be threatening. See *id.* at 367 (plurality opinion).

The prohibition of true threats in Section 875(c), however, does not operate as did the Virginia cross-burning statute: it does not target a highly specific activity (like cross-burning) that may be protected or unprotected depending on the circumstances. Rather, it reaches the category of threats, regardless of subject matter, but only when a statement amounts to a "true 'threat.'" *Watts*, 394 U.S. at 708. Accordingly, all of the speech covered by Section 875(c) consists of harmful activity that justifies regulation. Unlike in the Virginia statute in *Black*, proving subjective intent is not necessary to prevent the statute from sweeping in protected political (or artistic) speech.

2. Since the Eighteenth Century, legislatures and courts have proscribed and punished threats without requiring proof of a subjective intent to threaten. In

1754, the English Parliament enacted a statute making it a capital offense to "knowingly send any letter without any name * * * or signed with a fictitious name * * * threatening to kill or murder any of his Majesty's subject or subjects, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw, though no money or venison or other valuable thing shall be demanded." 27 Geo. II, c. 15. Conviction under that statute, which included no explicit intent-to-threaten requirement, required only that the letter contained language conveying a threat and that the defendant knew of the contents of the letter.

In *King* v. *Girdwood*, (1776) 168 Eng. Rep. 173 (K.B.), for example, the trial court instructed the jurors that to determine whether the defendant had violated the statute, they should assess "[w]hether they thought the terms of the letter conveyed an actual threat to kill or murder." *Id.* at 173. "[I]f they were of the opinion that it did, and that the [defendant] knew the contents of it, they ought to find him guilty; but * * * if they thought he did not know the contents, or that the words might import any thing less than to kill or murder, they ought to acquit." *Ibid.* On appeal following conviction, the reviewing judges "thought that the case had been properly left to the jury." *Ibid.* Other cases, in analyzing the existence of a threat, similarly focused on the language of the letter at issue, not the state of mind of the sender. See 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* 1116 (1806) (consideration of letter's "necessary construction" and how it "must be understood" in *Jepson & Springett's Case*); *Rex* v. *Boucher* (1831) 172 Eng. Rep. 826, 827 (K.B.) (consideration of whether letter "plainly convey[ed] a threat

to kill and murder," with no argument about subjective intent); *Rex* v. *Tyler* (1835), 168 Eng. Rep. 1330,1331 (K.B.) (consideration of whether "letter threatened" arson).

Between 1795 and 1887, seventeen States and Territorries enacted laws similar to the English prohibition on threatening letters.[4] The relevant statutes typically prohibited letters containing certain types of threats made with intent to extort, as well as letters containing certain other types of threats irrespective of intent. See, *e.g.*, 1795 N.J. Laws 108 (making it a misdemeanor for any person to "knowingly send or deliver any letter in writing, with or without a name subscribed thereto, or signed with a fictitious name, * * * threatening to accuse any person of a crime of an indictable nature by the laws of this state, with intent to extort from him or her any * * * valuable thing, or demanding money, goods or chattels, or other valuable thing; or threatening to maim, wound, kill or murder any person, or to burn his or her house, out-house, barn or other building, or stack or stacks of corn, grain or hay, *though no money, goods or chattels, or other valuable thing be demanded*") (emphases added).

Particularly in light of the similarity between these prohibitions and the 1754 English statute, the courts

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[4] See 1795 N.J. Laws 108; 1816 Ga. Laws 178; 1816 Mich. Territory Laws 128; 1826 Ill. Laws 145; 1832 Fla. Laws 68; 1838 Iowa Acts 161; Mo. Rev. Stat. ch. 47, § 16, at 396 (1844-1845); 1850 Cal. Stat. 242; 1858 Neb. Laws 64; 1860 Pa. Laws 390; 1863 Idaho Sess. Laws 463; 1864 Mont. Laws 205; 1867 Colo. Sess. Laws 219; 1 J.R. Whitehead, Compiled Laws of Wyoming 267 (1876); 1 John P. Hoyt, The Compiled Laws of the Territory of Arizona 90 (1877); 1885 Nev. Stat. 39; 18 Del. Laws 450 (1887).

in the relevant States presumably looked to English case law—which, as discussed, did not require proof of an intent to threaten—in applying their own anti-threat statutes. See, *e.g.*, *Commonwealth* v. *Burdick*, 2 Pa. 163, 164 (Pa. 1845) (considering English cases persuasive authority in interpreting similar state statute); cf. Stephen Shute, *With and Without Constitutional Restraints*, 1 Buff. Crim. L. Rev. 329, 329-330 (1998) (observing that "during the latter part of the eighteenth century and early part of the nineteenth century, Blackstone's *Commentaries on the Laws of England* (1765-1769) wielded if anything a greater degree of influence in the American courts than they did in the courts of their country of origin"). And domestic case law, while sparse, is consistent with the absence of an intent-to-threaten requirement. See, *e.g.*, *Hansen* v. *State*, 34 S.W. 929 (Tex. Crim. App. 1896) (reasoning that a charge of sending a letter with intent to kill or injure required that "the *letter* clearly contain[] a threat") (emphasis added).

Petitioner accordingly errs in suggesting (Br. 38) that "it has always been understood" that statutes prohibiting the sending of threatening letters require some specific intent. Treatises cited by petitioner do not distinguish clearly between prohibitions on threats with intent to extort, which expressly required proof of intent, and the related, but distinct, prohibitions on threatening letters that contained no such requirement. See 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 1201, at 664 & nn.5-6 (6th ed. 1877); 2 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 975, at 546 (1866). Likewise, the one case on which petitioner relies for the proposition that prosecutions under

threatening-letters statutes required proof of intent to threaten, *Norris* v. *State*, 95 Ind. 73 (Ind. 1884), actually involved a prosecution under a blackmailing statute with an express "intent to extort" element, *id.* at 76, not one of the many statutes that prohibited threatening letters without requiring proof of intent.

C. Prohibiting True Threats Without Proof Of Subjective Intent Does Not Unduly Restrict Expression

Petitioner contends (Br. 45-52) that even where a statement is threatening to a reasonable person, legislatures should be precluded from regulating it, as a prophylactic measure to avoid chilling legitimate protected speech. That approach has been rejected in the analogous contexts of fighting words and obscenity, and its speculative premise (that a subjective intent requirement is needed to avoid chilling valuable speech) is flawed.

1. In analogous categories of unprotected speech, proof of subjective intent is not required

a. This Court has not required proof of subjective intent in analogous circumstances involving other unprotected categories of speech. See *United States* v. *Martinez*, 736 F.3d 981, 987 n.3 (11th Cir. 2013) (per curiam) ("[O]bjective standards are not unusual in the free-speech context."), petition for cert. pending, No. 13-8837 (filed Feb. 21, 2014). A legislature can permissibly prohibit "so-called 'fighting words,'" *Cohen* v. *California*, 403 U.S. 15, 20 (1971), without regard to the speaker's state of mind. The Court has defined fighting words as those "personally abusive epithets which, when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Ibid.*; see *Chaplinsky*, 315

U.S. at 572 (defining "'fighting' words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

The definition of fighting words turns on how an "ordinary citizen" would react to the language used, not on the speaker's subjective intent. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940) (approving of the "many" decisions holding that someone may be convicted for "a breach of the peace" if he "make[s] statements likely to provoke violence and disturbance of good order, *even though no such eventuality be intended*") (emphasis added). As with true threats, allowing subjective intent to control ignores that the harms flow from the speech itself. And the Court has found a test that turns on reasonable understandings of one's words, in context, to be sufficiently protective of speech interests, notwithstanding that even a speaker with no intent to use fighting words will be held responsible for steering clear of such words in expressing his opinions and ideas.

The Court has also applied objective standards to the determination whether speech constitutes unprotected obscenity. Under *Miller* v. *California*, 413 U.S. 15 (1973), a legislature may prohibit materials as obscenity where (1) an "average person, applying contemporary community standards * * * find[s] . . . the work, taken, as a whole, appeals to the prurient interest"; (2) "the work * * * depict[s] or describ[es], in a patently offensive way, sexual conduct specifically defined by the applicable * * * law," and (3) "the work, taken as a whole, * * * lack[s] serious literary, artistic, political or scientific value." *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2744 (2011) (quoting *Miller*, 413 U.S. at

24). All elements of the *Miller* test turn solely on reasonableness or community standards. See *Ashcroft* v. *ACLU*, 535 U.S. 564, 576 n.7 (2002) (opinion of Thomas, J.) ("Although the phrase 'contemporary community standards' appears only in the 'prurient interest' prong of the *Miller* test, this Court has indicated that the 'patently offensive' prong of the test is also a question of fact to be decided by a jury applying contemporary community standards.") (citing *Pope* v. *Illinois*, 481 U.S. 497, 500 (1987)); *id.* at 579 (plurality opinion) (third element requires examination of "whether a reasonable person would find value in the material, taken as a whole") (ellipses and citation omitted); see also *Hamling*, 418 U.S. at 120-124. None of the elements of the test for obscenity is based on the speaker's subjective intent.

Reliance on reasonable understandings and community standards to define obscenity is constitutionally sufficient, so long as the defendant knows the "character and nature" of the material, *Hamling*, 418 U.S. at 123, even though it exposes a speaker to prosecution despite his subjective view that his speech has "serious literary, artistic, political or scientific value" or does not offend community standards. See *id.* at 121 (rejecting constitutional rule under which "the belief of the accused as to what was obscene, lewd, and lascivious" would be controlling). Speakers thus bear the onus to avoid communicating through what a jury will find obscene, just as speakers who are aware of the meaning and context of their statements bear the onus to avoid communicating through true threats.

Petitioner provides no sound reason for distinguishing the two contexts.[5]

b. Petitioner maintains (Br. 39) that the Court "has repeatedly insisted * * * that before a person can be held liable for speech, there must be proof he acted with culpable intent," but fails to address the absence of such requirements in fighting words and obscenity. Instead, he focuses on other types of speech less analogous to threats—primarily, speech inciting others to commit illegal acts, see Pet. Br. 39-41. It is not entirely clear that proof of subjective intent is constitutionally required for incitement. This Court has sometimes described incitement in part by reference to whether particular *words* were "directed," *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), or "intended," *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curiam), to incite imminent lawless action. But those shorthand descriptions may refer to the objec-

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[5] This Court has also described solicitation of crime as unprotected speech, see *United States* v. *Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), without suggesting that a person who was aware of the meaning and context of his solicitation but did not intend to solicit a crime would be immunized from prosecution. Because solicitation statutes typically require proof of subjective intent, the question whether it is constitutionally required has only rarely arisen. But one case to consider whether a speaker's solicitation of crime was constitutionally protected concluded that there was "sufficient likelihood of his solicitation being interpreted as a call to arms, * * * rather than as a communication of ideas through reasoned public discussion, to remove it from the category of protected speech" and to preclude dismissal of the charges. *People* v. *Rubin*, 96 Cal. App. 3d 968, 980 (Cal. Ct. App. 1979), cert. denied, 449 U.S. 821 (1980).

tive manifestation of intent communicated by the statements. See *White*, 670 F.3d at 511-512 ("[T]he *Brandenburg* test only requires that the speaker use specific words advocating unlawful conduct. It does not require that the speaker have a specific intent to incite unlawful conduct."); see, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (noting, without reference to an intent requirement, a "substantial question" whether a speaker whose "strong language" is "followed by acts of violence" may "be held liable for the consequences of that unlawful conduct").

In any event, in the context of incitement, an intent requirement would be a substitute for, rather than a replacement of, a reasonable-person standard. Incitement cannot be defined analogously to true threats by measuring the reactions of a reasonable person aware of the context. Criminal conduct is never a legally "reasonable" reaction. A prophylactic subjective-intent requirement in incitement, where a reasonable-person inquiry cannot work, does not indicate that *both* are required in the distinguishable context of true threats.

Petitioner's reliance (Br. 41-43) on mens rea requirements for certain kinds of false speech is likewise misplaced. Had petitioner made a false statement that injured his wife's reputation—a statement far less harmful than the posts that put her in fear for her life—he could have been found liable in tort under a negligence standard. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 773-775 (1986) (observing that a plurality of the Court has held this standard sufficient even for presumed and punitive damages for false speech about a private figure on matter of pri-

vate concern). Decisions of this Court requiring recklessness or knowledge of falsity in certain public contexts are based on considerations absent from the true-threats context. Because complete accuracy is impossible, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964), requiring perfect fact-checking of certain publicly-focused speech would inevitably delay or suppress important and truthful contributions to the marketplace of ideas. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340-341 (1974); see also *Illinois* v. *Telemarketing Assoc.*, 538 U.S. 600, 620 (2003) (protected fundraising). A scienter requirement thus protects valuable speech. But no similar free speech values apply in the context of true threats, where a rigorous reasonable-person standard protects sharp, caustic, or artistic comments, and the making of a true threat inflicts immediate and serious personal and societal harms. Speakers are expected to avoid inflicting those harms, just as they are expected to avoid using fighting words.

2. Speculation about chilling speech does not support an intent-to-threaten requirement

Petitioner asserts (Br. 45-52) that failure to require proof of subjective intent will chill protected speech because it depends too much on the determinations of juries and creates an unacceptably high risk of punishing mere "misunderstandings." A jury properly instructed on the reasonable-person definition of true threats, however, should not convict a defendant based on a legitimate misunderstanding. The requirement of proof beyond a reasonable doubt affords considerable protection in this setting, just as it does in refuting vagueness claims, in the regulation of speech, based on the "mere fact that close cases can

be envisioned." *United States* v. *Williams*, 553 U.S. 285, 305-306 (2008). If the potentially innocuous contextual meaning of the defendant's statement might not be readily apparent to the jurors from their personal experiences (see Pet. Br. 48-49), a defendant is free to introduce evidence on that point, including his own testimony, testimony of others in his community, or even expert testimony. The criminal-justice system traditionally trusts juries to set aside their preconceptions and reach reasoned disinterested conclusions, even when the outcome cannot be predicted with complete certainty before trial. Such trust is no less warranted in this setting than in others.

The record in this case illustrates how a reasonable-person standard for true threats is administrable for both prosecutors and juries. Petitioner contends (Br. 51-52) that treating his post of the photo holding a knife to his coworker's neck as a threat would reflect a serious misunderstanding of his humorous intent. The government, however, did not prosecute petitioner for making that post. See J.A. 272 (government's closing argument stating that Count 1 charged only later posts). And the jury drew careful distinctions between the various posts by acquitting on the posts allegedly threatening the employees and patrons of the amusement park, but convicting on the posts concerning petitioner's wife, law enforcement, local kindergartens, and the FBI agent. Pet. App. 10a.

b. Petitioner suggests (Br. 53-57) that in the absence of an intent-to-threaten requirement, artists will be chilled from producing the sort of "fantasies of the aggrieved" that he asserts have "been a staple of popular culture during most of recorded history." Yet he acknowledges that such art has "arguably * * *

reached its apotheosis in rap music" written and distributed during a period when the federal courts of appeals have almost uniformly applied a reasonable-person standard to threat prosecutions under Section 875(c). Pet. Br. 54-55 & nn. 12-15; see Br. in Opp. 14 (citing cases from a large majority of the circuits adopting that view).

If rap music has thrived in that legal environment, a true-threats standard that does not require proof of subjective intent can hardly be thought to chill the speech that petitioner highlights. The reason that petitioner can confidently cite the rapper Eminem's lyrics as examples of art, rather than threats, is that no reasonable person would understand those lyrics, in the full context in which they were delivered and publicized, to "communicate a serious"—*i.e.*, real—"expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." J.A. 301. As petitioner himself recognizes (Br. 54), such lyrics are plainly "hyperbole." See *Jeffries*, 692 F.3d at 482 ("[T]he method of delivering a threat illuminates context, and a song, a poem, a comedy routine or a music video is the kind of context that may undermine the notion that the threat was real."). Petitioner has not identified even a single example of a threat conviction (or even a prosecution) of speech of that sort.

Petitioner's suggestion (Br. 55-57) that his own speech was indistinguishable from the speech of the various commercial artists he claims to have imitated wholly disregards the very different contexts in which his own statements were made. Petitioner's post asking whether his wife's restraining order was "thick enough to stop a bullet," even if classified as rap, was

threatening in light of petitioner's evident emotional disturbance following the breakdown of his relationship with his wife, Pet. App. 3a; his previous posts threatening to kill his wife in particularly graphic ways, see, *e.g.*, J.A. 344 (post stating that petitioner would not "rest until [his wife's] body is a mess, [s]oaked in blood and dying from all the little cuts"); and his awareness of his wife's request for and receipt of the referenced restraining order based in large part on the fear inspired by those previous posts, Pet. App. 4a; J.A. 149-150, 255. Eminem's lyrics, Bob Dylan's music, and other examples cited by petitioner do not involve factual backdrops even remotely analogous to those deeply disturbing events. By the same token, while a comedian's satire about threatening the President would not reasonably be viewed as a threat, a perversion of that satire that specifically referenced petitioner's wife (and the house where she lived) is threatening, particularly in light of petitioner's stated willingness to "go to jail" for having made the post. J.A. 333.[6]

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[6] Petitioner cites only one "not hypothetical" (Br. 51) case, *United States* v. *Fulmer*, 108 F.3d 1486 (1st Cir. 1997), to support his theory that a true-threats test will chill protected speech. But that case involved not rap music, personal expression, or political speech, but direct communications to an FBI agent who declined to support a prosecution the defendant favored, prompting the defendant's call to the agent that "[t]he silver bullets are coming." *Id.* at 1490. As the court of appeals noted, the jury was in a position to assess the tone of the defendant's voice and the credibility of witnesses in resolving ambiguities in the statement. *Id.* at 1492. In any event, the defendant was charged with violating 18 U.S.C. 115(a)(1)(B) (1994), which prohibited only threats made with "intent to impede, intimidate, or interfere with" a federal official in the performance of official duties, or with "intent to retaliate

In petitioner's view, no matter how clear it is that a threat would be taken as a serious intention of an intent to do harm, such as "declaring that three Seventh Circuit judges deserved to die for their recent decision that the Second Amendment did not apply to the states," *United States* v. *Turner*, 720 F.3d 411, 413 (2d Cir. 2013), petition for cert. pending, No. 13-1129 (filed Mar. 24, 2014), the defendant is constitutionally entitled to avoid conviction based on his own subjective belief that the communication will not be understood as threatening. A defendant who is familiar with the meaning of the words spoken and their context, however, can constitutionally be held accountable for the immediate and serious harms that true threats inflict. The First Amendment's protection of free speech—which has historically coexisted with a categorical denial of protection to true threats—does not demand otherwise.

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against" that official "on account of the performance of official duties." See 108 F.3d at 1489. *Fulmer*'s facts thus cannot support petitioner's thesis that a subjective-intent element is the cure-all for an errant threats prosecution. One amicus brief mentions a case in which a teen was charged for making a Facebook comment about his intention to shoot a kindergarten class. See Student Press Law Center Amicus Br. 17-18. He, too, was charged under a statute that requires proof of intent. See Mac McCann, *Facebook 'Threat' Case Unresolved*, Austin Chronicle (Feb. 28, 2014), http://www.austinchronicle.com/news/2014-02-28/facebook-threat-case-unresolved.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

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REPLY BRIEF

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ANTHONY D. ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Fl.
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

JOHN P. ELWOOD
Counsel of Record
RALPH C. MAYRELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

DANIEL R. ORTIZ
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

MARK T. STANCIL
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500

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Cases—Continued: **Page(s)**

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Cases—Continued: **Page(s)**

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25 *The American & English Encyclopedia of Law* (Charles F. Williams ed., 1894).....5

2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 1201 (6th ed. 1877) 5

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Miscellaneous—Continued: **Page(s)**

Compact Oxford English Dictionary (2d ed. 1989) 6

53 Cong. Rec. 9377 (1916) 12

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Exchange Between Bob Woodward and White House Official in Spotlight, CNN Politics (Feb. 27, 2013), http://goo.gl/K3QZkR 8

Federal Justice Statistics 2010 Statistical Tables, U.S. Dep't of Justice (Dec. 2013) 15

Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech*, 54 Cath. U. L. Rev. 1 (2004) 17

Leslie Kendrick, *Free Speech and Guilty Minds*, 114 Colum. L. Rev. 1255 (2014) 18

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Model Penal Code (1980)

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§211.3 4

11 *Oxford English Dictionary* (1st ed. 1933) 6

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Miscellaneous—Continued: **Page(s)**

Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197 19

Threatening Communications: Hearing on H.R. 3230 Before the H. Comm. on the Post Office & Post Roads, 76th Cong. (1939) 7

Webster's New Int'l Dictionary (2d ed. 1958) 6

Webster's New World Dictionary (3d college ed. 1988) 6

2 Francis Wharton, *Criminal Law & Proc.* § 803 (Ronald A. Anderson ed., 12th ed. 1957) 4

REPLY BRIEF FOR THE PETITIONER

The government treats two propositions as articles of faith. First, subjective intent *must* be irrelevant to criminal liability because a statement "that appears to be [a] serious [threat] is equally harmful regardless of the speaker's private state of mind." U.S.Br.16. Second, it is acceptable to impose felony liability whenever "a reasonable person would foresee that the statement would be interpreted" as a threat, *id.* at 11 (quoting J.A.301), because "speakers who are aware of the meaning and context of their statements bear the onus to avoid communicating through true threats," *id.* at 49. Both are fundamentally flawed.

Most acts giving rise to criminal liability are "equally harmful regardless of the [defendant's] private state of mind." U.S.Br.16. But our constitutional system nevertheless employs a strong presumption that "an injury can amount to a crime only when inflicted by intention," *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). Even the government concedes that "conventional *mens rea*" analysis requires that "a statute silent on that point" be read to "require that the defendant know the facts that make his conduct illegal." U.S.Br.28. Otherwise, strict criminal liability would be the rule, not the rare exception.

The government also errs in drawing the line for punishment where "a reasonable person would foresee" that his words would cause fear. While the government claims that standard has applied since time immemorial, it actually represents a late-20th-century departure from the traditional American

practice of requiring proof of intent to place in fear. The inherent indeterminacy of basing criminal liability on the reaction of a hypothetical "reasonable person" is alien to our free-speech tradition. Rather, "[e]xacting proof requirements" are necessary before imposing liability because "First Amendment freedoms need breathing space to survive." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); accord, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The prospect that a speaker "may accidentally incur liability for speaking" can have severe chilling effects, see *United States* v. *Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment). The government's assurances that "legitimate misunderstanding[s]" will not result in conviction rings hollow in light of real-world experience, see Pet.Br.51 (conviction for ambiguous statement, "[t]he silver bullets are coming"), and the growing number of questionable arrests and detentions under a vague standard that tells law enforcement, "it doesn't matter what [the speaker] thinks," J.A.192; see p.24, *infra*.

The government has not demonstrated that state and federal statutes that require proof of subjective intent fail to protect against fear and disruption.[1] Indeed, one of the government's preferred examples—threats against judges—undermines the government's argument since the relevant federal statute requires proof of specific "intent to impede, intimidate, * * * interfere with[,] * * * [or] retaliate against,"

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[1] *E.g.*, *State* v. *Cahill*, 80 A.3d 52, 55-56 (Vt. 2013); *Donnell* v. *State*, No. A09-828, 2010 WL 772388, at *4 (Minn. Ct. App. Mar. 9, 2010); *State* v. *J.M.*, 28 P.3d 720, 725 (Wash. 2001).

18 U.S.C. §115.[2] Nor would requiring proof of intent pose an obstacle to prosecuting the government's other favorite example: bomb threats, see U.S.Br.15, 16, 25, 29, 32, 38. A person who perpetrates a bomb hoax has the requisite specific intent because he does so for the purpose of causing needless fear and disruption.

The government's argument boils down to this: Congress intended—and the Constitution permits—prosecution of speakers whose purpose was not to cause fear and who even lack knowledge that their speech will cause fear. See 1 Wayne R. LaFave, *Substantive Criminal Law* §5.2(a), at 341 (2d ed. 2003) (explaining traditional view of "specific intent"). That conflicts with basic tenets of criminal law and bedrock First Amendment principles this Court has safeguarded for generations.

A. The Ordinary Meaning Of "Threat" Requires Intent To Cause Fear

The government asserts that whether a statement is a "threat" punishable by 18 U.S.C. §875(c) turns solely on objective "circumstances" surrounding a statement; indeed, it would be "bizarre" (U.S.Br.38 (internal quotation marks omitted)) for felony liability to turn on such an irrelevancy as the speaker's intent. The government insists that this has always been so, *id.* at 43-45; and, consistent with the purposes of threat statutes, it *must* always be so. *Id.* at 16, 18, 35, 39, 42. But the points that the government

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[2] See U.S.Br.25 (citing *United States* v. *D'Amario*, 350 F.3d 348, 352 (3d Cir. 2003)); *id.* at 56 (citing *United States* v. *Turner*, 720 F.3d 411, 413 (2d Cir. 2013), pet. for cert. pending, No. 13-1129 (filed Mar. 24, 2014)).

does not dispute belie its categorical claims, and demonstrate that Congress understood that Section 875(c)'s proscription on "threat[s]" prohibits statements made with intent to cause fear.

1. The earliest American cases unequivocally required that "A threat, in order to violate [the law], * * * *must be intended to put the person threatened in fear of bodily harm, and* must produce that effect, *and* must be of a character calculated to produce that effect upon a person of ordinary firmness." *State* v. *Benedict*, 11 Vt. 236, 239 (1839) (emphasis added). "There are, in some of the definitions, references to language tending to provoke a breach of the peace * * * ; but the authorities have very plainly held that this covers nothing that is not *meant* * * * to bring about violence directly." *Ware* v. *Loveridge*, 42 N.W. 997, 998 (Mich. 1889) (emphasis added); *State* v. *Graham*, 121 N.C. 623, 623 (1897) ("intent or design" an "essential element" of "sending a threatening letter") (citing *Rex* v. *Boucher* (1831) 172 Eng. Rep. 826 (K.B.)).

Likewise, in the years following Section 875(c)'s enactment, it was black-letter law "that a threat, in order to violate the public peace, * * * must be *intended* to put the person threatened in fear of bodily harm and must produce that effect, and must be of a character calculated to produce that effect upon a person of ordinary firmness." 2 Francis Wharton, *Criminal Law & Proc.* §803 (Ronald A. Anderson ed., 12th ed. 1957) (emphasis added); cf. Model Penal Code §211.1 cmt. 1, at 177 (1980) (noting prohibition on "intentionally plac[ing] another in fear"); *id.* §211.3 (prohibiting "threaten[ing] * * * with purpose to terrorize" or

"cause evacuation of a building"). The government ignores these authorities.

The government cites a pre-Revolutionary English threatening-letter statute with "no explicit intent-to-threaten requirement," U.S.Br.44, and a handful of equivocal English decisions construing it. But none of those cases explicitly addressed the relevance of intent, much less held intent irrelevant. *Ibid.* And the government disregards authority explaining that the relevant inquiry was the *intention of the writer*—that the statute was "levelled against such whose *intention* it was, (*by writing* such letters ***) ***, [to] obtain their object *by creating terror* in [the victim's] mind." 1 William Oldnall Russell & Daniel Davis, *A Treatise on Crimes & Misdemeanors* 1845 (1st Am. ed. 1824) (emphasis added)).

The government cites state statutes purportedly patterned after that English law. U.S.Br.45. Even if those laws had been subject to First Amendment limitations, see *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947), the government cites no authorities giving them its favored construction. It was well established that "[t]he intent, both under the unwritten law and under the statutes, must be evil." 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* §1201, at 664 (6th ed. 1877); accord 25 *The American & English Encyclopaedia of Law* 1073 (Charles F. Williams ed., 1894) (under threatening-letter statutes, "intent to extort, or to do some other unlawful act ***, must be proved"). Despite the absence of a textual intent requirement, Kentucky's threatening-letter statute prohibited letters "written *** for the purpose of intimidating, alarming, disturbing, or in-

juring another person." *Commonwealth* v. *Morton*, 131 S.W. 506, 508 (Ky. 1910); cf. *Benedict*, 11 Vt. at 238 (construing silent statute to require intent to cause fear). The government's claim that its rule has "historically coexisted" with the First Amendment (U.S.Br.56) is fanciful.

2. This historical context frames Section 875(c)'s use of "threat." The government's effort to redefine "threat" to involve only "*apparent* intent" (*id.* at 25 (emphasis added)) finds no support in the word's definition, which is framed from the perspective of the person who "declar[es] * * * one's intention of inflicting injury," 11 *Oxford English Dictionary* 352 (1st ed. 1933), without mentioning the word "apparent." Indeed, the government cites no dictionary that defines "threat" with reference only to the objective circumstances surrounding a statement.

The government argues those definitions are irrelevant because they involve an "intent to inflict harm" rather than to cause fear. U.S.Br.24. But these definitions contemplate that the statement be communicated *intentionally* for the purpose of causing fear, defining a "threat" as "an expression of intention to hurt, destroy, punish, etc. *as in retaliation or intimidation*," *Webster's New World Dictionary* 1394 (3d college ed. 1988) (emphasis added), or a means to "effecting coercion or duress," *Webster's New Int'l Dictionary* 2633 (2d ed. 1954), and "threaten," as "*try[ing] to influence* (a person) by menaces," *Compact Oxford English Dictionary* 2051 (2d ed. 1989) (emphasis added). *All* these definitions contemplate an intentional effort to cause fear. This conclusion is reinforced by the recurring appearance in the U.S. Code

of "threaten" among words denoting intentional menacing: "coerce, intimidate, [and] threaten." 42 U.S.C. §3617; *id.* §12203(b); see also 5 U.S.C. §6385; 18 U.S.C. §112(b).

3. Section 875(c)'s legislative history confirms this understanding. The government correctly notes that the provision was proposed to eliminate a predecessor provision's intent-to-extort requirement to "render present law more flexible." U.S.Br.26 (quoting *Threatening Communications: Hearing on H.R. 3230 Before the H. Comm. on the Post Office & Post Roads*, 76th Cong. 5 (1939) ("*1939 Hearing*")). But the *only* issue identified with prior law was with "threats due to animosity or spite," and "threat[s] * * * on account of revenge," *1939 Hearing* at 9, 7 (statement of William Barron, Criminal Division, Department of Justice), and the government wanted authority to prosecute "even when [it] could not prove that the motive for the threat was extortion," *id.* at 12; *ibid.* (sole issue "[w]hether the motive of the threat be the acquisition of money or some other personal advantage") (Statement of Rep. Flannery). But the wish to prohibit both "threats made for the purpose of extorting money and threats borne of other (intentional) purposes," did not encompass a wish to abandon historical prerequisites for criminal liability. *United States* v. *Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*).[3]

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[3] The government is wrong that Congress considered Section 871's mental state in enacting Section 875(c). The *sole* reference to that provision in the legislative history concerned *sentencing*. *1939 Hearing* 13.

4. Tellingly, the only examples the government can give of statements where intent does not (*seem* to) matter are those involving direct and unequivocal risks to life, such as an anonymous letter stating, "I will kill you." U.S.Br.25. While that statement is undoubtedly a threat, it is not because intent does not matter: It is because the government has framed the hypothetical so that intent is obvious. The government's model for culpability crumbles in the far more common circumstance of ambiguous statements—say, "you will regret doing this," see *Exchange Between Bob Woodward and White House Official in Spotlight*, CNN Politics (Feb. 27, 2013), http://goo.gl/K3QZkR. Under such circumstances, people would ordinarily consider the speaker's intent highly relevant. See Pet.Br.23-24.

A variation on the government's "bomb hoax" example underscores this: Assume two high-school students simultaneously overhear another student telling friends, "The pipes are in my locker. We 'blaze up' at 2:30." Although neither has heard the phrase before, one correctly infers the students plan to smoke marijuana after school, while the second incorrectly suspects something more sinister. Both make "an anonymous call about a pipe bomb in a school [locker]." U.S.Br.25. Because the objective circumstances are identical, under the government's theory, *both* callers are guilty of making a threat, and any difference in treatment would be "bizarre." U.S.Br.38. That makes no sense: The first student (who correctly concluded there was no bomb) intended to create fear and disruption, while the other intended to save lives. "The government may say that" a speaker's intent is irrelevant to whether he has

made a threat, "but no one else would." *Watson* v. *United States*, 552 U.S. 74, 79 (2007).

B. Bedrock Principles Of Statutory Construction Require Proof Of Intent To Cause Fear

Although the government makes much of the fact that Section 875(c) does not use the word "intent," U.S.Br.22-23, it *agrees* that "it is appropriate to infer" a mental state for such an offense. *Id.* at 22, 28. The only question is *which* mental state is appropriate for a five-year felony punishing pure speech.

1. The government concedes that "a statute silent on" *mens rea* must be read to "require that the defendant know the facts that make his conduct illegal." U.S.Br.28 (quoting *Staples* v. *United States*, 511 U.S. 600, 605 (1994)). But the government departs from that principle to claim that it is enough for a speaker to know the "character" of his remarks. U.S.Br.30. A statement is a "threat," under the government's definition, if it causes the victim fear, and that fear is reasonable. U.S.Br.18. A defendant thus does not "know the facts that make his conduct illegal," *Staples*, 511 U.S. at 605, unless he *knows* that *his statements will cause fear*. The government's proposed test falls far short of that.

Under the government-proposed jury instructions, J.A.25, it was enough that "a *reasonable person would foresee* that the statement *would be interpreted* *** *as a serious expression of an intention* to inflict bodily injury," J.A.301 (emphasis added). That test is doubly flawed, turning not on the defendant's mental state but on that of a "reasonable person," and turning not on *actual knowledge* but on what a reasonable person "would foresee." Even in cases

involving conduct not implicating the First Amendment, this Court has insisted on proof the defendant had *actual knowledge* of what makes the conduct criminal. It is not enough, for example, that a "reasonable person would foresee" that a military-style rifle was capable of automatic fire; the *defendant* must "*know* that his weapon possessed automatic firing capability." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994) (emphasis added) (discussing *Staples*, 511 U.S. at 605). Similarly, the defendant must "*know*[] that [anticompetitive] effects would most likely follow" from aggressive business practices, *U.S. Gypsum*, 438 U.S. at 444 (emphasis added); and must "*kn[o]w* that the [drug paraphernalia] * * * [is] likely to be used with illegal drugs." *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 516, 524 (1994) (emphasis added).[4]

2. The government suggests that requiring proof that the defendant knows anything more than the general "character" of his remarks "cannot be reconciled with" *Hamling* v. *United States*, 418 U.S. 87 (1974). U.S.Br.15. But *Hamling* principally stands for the uncontroversial proposition that defendants need not possess "knowledge of the *legal status* of [obscene] materials" to be guilty. *Id.* at 123-

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[4] The government is wrong that "the absence of any [statutory] reference to a subjective intent to threaten makes it inappropriate to read such a specific-intent requirement into the statue." U.S.Br.22-23. When a "general intent [requirement] with respect to the *actus reus*"—that the defendant knows the words he is saying—"would run the risk of punishing" innocent conduct, the "situation[] may call for implying a specific intent requirement." *Carter* v. *United States*, 530 U.S. 255, 269 (2000).

124 (emphasis added); see *X-Citement*, 513 U.S. at 73 n.3. This Court has not applied the government's broad reading of *Hamling*, even in circumstances far more closely related to the conduct there.

The government's current position suggests that it would have been enough in *X-Citement Video* for the defendant to know the "nature and character" of the materials—that they depicted sexual acts involving *young people*. After all, the harm from creating and distributing child pornography occurs regardless whether individual vendors know those portrayed are underaged, U.S.Br.15; knowledge of the performers' youth provides enough "context" to make the defendant "bear the onus to avoid [distribu]ting" child pornography, *id.* at 49; and materials portraying young persons engaged in sex have "slight social value as a step to truth," *id.* at 36. But emphasizing "First Amendment constraints," 513 U.S. at 71, this Court held that defendants must "'know[]' *** the age of the performers" to warrant punishment, *id.* at 78. Even the *government* advocated an actual knowledge standard, recognizing that, "to know the nature and character of child pornography," under *Hamling*, "one must know that it depicts children." U.S.Br.44, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) (internal quotation marks omitted). The government fails to explain why it is not likewise necessary that a defendant *know* that his statements *will create fear*.

3. The government next argues that because Congress "set[] forth specific-intent requirements explicitly" in Section 875(b) and (d), "it is unlikely to have intended such a requirement in Section 875(c)

without saying so." U.S.Br.23. But as the government concedes, subsections (b) and (d) concern a *different* specific-intent requirement for the aggravated threat offense of acting "with intent to extort." That Congress specified the aggravating offense's *mens rea* hardly implies that the simple offense requires none—particularly when that *mens rea* is the traditional (and self-evident) "intent to threaten." Indeed, that the aggravated offense uses "threat" to imply an intent to place in fear suggests the simple offense employs the same meaning. Moreover, in *Morissette*, this Court inferred a requirement of an "intent to convert" government property in a provision containing no textual intent requirement, 342 U.S. at 271, though the *statute's next sentence* explicitly required proof of "intent to convert [the property] to his use or gain." 18 U.S.C. §641 (1949).

4. The presidential threats statute, 18 U.S.C. §871, provides no support for the government's reading of Section 875(c). Since its enactment shortly before America's entry into World War I, Congress and the courts have viewed the presidential threats statute as "a very different offense," 53 Cong. Rec. 9377 (1916), "since the reasons why threats of violence are outside the First Amendment ... have special force when applied to the person of the President." *Virginia* v. *Black*, 538 U.S. 343, 362 (2003) (internal quotation marks omitted). Unlike most threat statutes, Section 871 was designed not to protect the subject of threats from fear, but to prevent incitement of listeners. 53 Cong. Rec. 9377 (1916); *Watts* v. *United States*, 402 F.2d 676, 678-679 (D.C. Cir. 1968), rev'd on other grounds, 394 U.S. 705 (1969). Section 871

has always been understood to be unique among threat statutes, so that traditional "definitions of 'threat' *** are not pertinent." *United States* v. *Stickrath*, 242 F. 151, 155 (S.D. Ohio 1917) (distinguishing *Benedict*); accord *United States* v. *Stobo*, 251 F. 689, 691-692 (D. Del. 1918).

In any event, the government is wrong that by the time of Section 875(c)'s enactment, it was settled that intent was irrelevant under Section 871. Even *Ragansky* v. *United States*, the government's principal authority, cautioned that the defendant there had "not claimed that *** he intended [listeners] to understand" "that he was joking," reflecting that the court deemed intent to threaten relevant. 253 F. 643, 644-645 (7th Cir. 1918). Other contemporaneous decisions indicated intent was relevant, saying the statute prohibited "threatening words *calculated* to inflame or have a sinister influence upon the minds of others." *Stobo*, 251 F. at 695 (emphasis added); accord *United States* v. *Daulong*, 60 F. Supp. 235, 236 (W.D. La. 1945) (same); *United States* v. *Reid*, 49 F. Supp. 313, 318 (W.D. La. 1943) (admitting evidence in Section 871 trial "to show intent *** as to the wilful and serious nature of the statement").

Indeed, courts continued to consider subjective intent relevant in Section 871 prosecutions decades after enactment of Section 875(c). The D.C. Circuit in *Watts* emphasized that the speaker had not "claim[ed] at trial that his words were uttered in jest," and noted that "subjective intent of the speaker, standing alone, *has not been considered dispositive*." 402 F.2d at 681-682 (emphasis added). The Fourth Circuit *continues* to require proof of specific intent to

incite or "disrupt presidential activity." *United States* v. *Patillo*, 438 F.2d 13, 15-16 (4th Cir. 1971) (en banc). *Ragansky* "is hardly the sort of uniform construction that Congress might have endorsed" in enacting Section 875(c). *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 532 (1994).

5. The earliest case the government cites that clearly embraces its position dates to shortly after the Kennedy assassination. U.S.Br.22 (citing *Pierce* v. *United States*, 365 F.2d 292 (10th Cir. 1966) (construing Section 871)). By then, there were *already* numerous decisions holding that "intent to threaten is an essential element of [Section 875(c)]." *United States* v. *LeVison*, 418 F.2d 624, 626 (9th Cir. 1969) (citing *Seeber* v. *United States*, 329 F.2d 572, 577 (9th Cir. 1964)); accord *United States* v. *Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966);[5] Pet.Br.25-26 (collecting authorities). The government's claimed historical consensus is, in fact, a relatively recent development dating to the 1980s and later.

6. The government offers one conclusory paragraph on the difficulty of proving specific intent, U.S.Br.33, but never attempts to show that prosecutors are systematically unable to make that showing. Nor does the government deny that searching the computers and cellphones used for charged communications will likely yield records of

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[5] Although the government claims *Dutsch*'s statement was dictum, U.S.Br.34, the Fourth Circuit contemporaneously explained that *Dutsch* held that evidence was properly admitted to prove that "ambiguous words * * * were in fact said with the intent to threaten," *United States* v. *Baldivid*, 465 F.2d 1277, 1284 (1972).

speakers' innermost thoughts relevant to prove intent. See *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014). Indeed, the government has previously asserted that the objective standard "is already so demanding" as to be functionally indistinguishable from what is required to prove subjective intent. *E.g.*, U.S.Br.19, *United States* v. *Francis*, 164 F.3d 120 (2d Cir. 1999), 1997 WL 33483534. The government proves specific intent hundreds of times every year in trials for drug offenses (*e.g.*, possession of narcotics with intent to distribute them), violent crimes (*e.g.*, murder, assault with intent to kill), and a multitude of fraud offenses. Indeed, *tens of thousands* of defendants do not even contest guilt of specific-intent crimes and simply plead guilty. See *Federal Justice Statistics 2010 Statistical Tables*, U.S. Dep't of Justice (Dec. 2013), http://goo.gl/CnWAVa.

C. The First Amendment Requires Proof Of Subjective Intent To Threaten

One of the most consistent principles of First Amendment jurisprudence has been the need for "[e]xacting proof requirements" before imposing liability for speech. *Telemarketing Assocs.*, 538 U.S. at 620. The government does not even acknowledge this principle, which it reimagines as a narrow tolerance for "[im]perfect fact-checking of certain publicly-focused speech," to avoid delaying important "contributions to the marketplace of ideas." U.S.Br.52. Instead, the government proposes a new and dangerous idea that speakers "bear the onus to avoid communicating through true threats." *Id.* at 49.

The government cites no authority for its novel "burden of speech" argument. For good reason: This Court has consistently held that it is necessary to tolerate "instance[s] of individual distasteful abuse of a privilege" to avoid chilling free speech. *Cohen* v. *California*, 403 U.S. 15, 25 (1971). "[M]ens rea requirements * * * provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment).

1. The government's few cases fall far short of supporting its negligence standard. The reason *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam), focused on circumstances rather than intent was because the defendant did not contest the "subjective intent of the speaker." *Watts*, 402 F.2d at 681. Even then, this Court expressed "grave doubts" that the government had proved *mens rea* based only on the speaker's "*apparent* determination" and the fact he had "voluntarily uttered the charged words." 394 U.S. at 708. The two cases that the government cited in *Watts*—*Ragansky* and *Pierce*—are the very ones it cites here. See U.S.Br.22; compare *United States* v. *Patillo*, 431 F.2d 293, 297 (4th Cir. 1970) (suggesting *Ragansky* and *Pierce* were "discredited by *Watts*"), aff'd on reh'g, 438 F.2d 13 (4th Cir. 1971) (en banc). The Court's doubts counsel even more strongly against the government's position outside the context of the presidential threats statute, where the need to prohibit violent threats "ha[s] special force." *Black*, 538 U.S. at 362 (internal quotation marks omitted).

Likewise unavailing is the government's reliance on a "fighting words" case predating *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), by a quarter century. U.S.Br.48 (citing *Cantwell* v. *Connecticut*, 301 U.S. 296, 309 (1940)). Considered in context of subsequent decisions, "an intent requirement is implicit in the elements the state must prove to proscribe speech under the fighting words doctrine.'" Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech*, 54 Cath. U. L. Rev. 1, 33 n.211 (2004).

The government fares no better with its traditional port-of-last-resort when justifying speech restrictions—analogy to obscenity. See *United States* v. *Stevens*, 559 U.S. 460, 481-482 (2010) (rejecting analogy); see also *Brown* v. *Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (same). Obscenity prosecutions usually involve consensual, commercial transactions. Threats, in contrast, involve noncommercial interactions the listener does not welcome. The profit incentive gives speech in obscenity cases a robustness that explains both the lack of a strong *mens rea* requirement in such cases, cf. *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 381 (1977); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61, 65 (1973), and the government's inability to cite threat cases endorsing its strained analogy.

The government speculates that this Court's insistence in incitement cases on proof that the speaker "intended to produce * * * imminent disorder" (*Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curiam)) simply "may refer to the objective manifestation of intent." U.S.Br.50-51. But it cannot reconcile that position with *Claiborne Hardware*'s failure to find incitement

despite statements that "might have been understood as" inciting violence, Pet.Br.40 (quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982))), or with the prevailing understanding of that case. *E.g.*, Leslie Kendrick, *Free Speech and Guilty Minds*, 114 Colum. L. Rev. 1255, 1257 & n.3 (2014); Pet.Br.39-40.

2. The government claims that *Virginia* v. *Black*, 538 U.S. 343 (2003), neither addressed nor resolved "whether a speaker must have a subjective intent to threaten before his communication will be deemed a true threat." U.S.Br.41. The government does not deny, however, the central role intent played in each of the opinions supporting the judgment. *Id.* at 40-43. But it emphasizes that parts of the majority's opinion used words of inclusion ("*encompass*" and "*type*") U.S.Br.41, and that the Court's description of the general legislative purpose for banning threats (protection against "fear of violence") accords with its preferred reading. *Id.* at 42.

In the same paragraph of *Black* the government quotes—indeed, the *very next sentence* after stating that threat statutes protect against "fear of violence"—the Court held that "[i]ntimidation in the constitutionally proscribable sense *** is a type of true threat, where a speaker directs a threat *** *with the intent* of placing the victim in fear of bodily harm or death." 538 U.S. at 360 (emphasis added). Unless the government contends that there is a category of *non-intimidating* "true threats," the import of that statement is that for a speaker's words to be "constitutionally proscribable," he must "inten[d] [to]

place[] the victim in fear of bodily harm or death." *Id.* at 360.

Moreover, *every* opinion mentioned the importance of subjective intent in "distinguish[ing] between a cross burning done with the [protected] purpose of creating anger or resentment" and one done with the proscribable "purpose of threatening or intimidating a victim." *Id.* at 366-367 (plurality opinion); Pet.Br.44-45 (relevant excerpts); accord *United States* v. *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (O'Scannlain, J.) ("[E]ach of the other opinions [in *Black*], with the possible exception of Justice Thomas's dissent, takes the [plurality's] view of the necessity of an intent element."). "If there is no such First Amendment requirement [of intent to intimidate], then Virginia's statutory presumption was * * * incapable of being unconstitutional in the way that the majority understood it." Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217.

The government insists that *Black* focused on intent to intimidate only because without it, "a defendant could be convicted for burning a cross in the context of a movie, a play, or other situation in which a reasonable observer would have understood it not to be threatening." U.S.Br.43. But the plurality cited those examples because "a burning cross is not always *intended* to intimidate," and "contextual factors" are "necessary" to determine "inten[t] to intimidate." 538 U.S. at 365, 366-367 (emphasis added). Tellingly, *Black*'s fifty-plus pages contain not a *single* reference to how a reasonable person would view speech.

D. The Negligence Standard Punishes Protected Speech

The government presents two arguments why its negligence rule accords with First Amendment principles. First, "[a] statement that is threatening to a reasonable person has little legitimate expressive value." U.S.Br.36. Second, jurors' consideration of "context" assures that people will not be convicted "based on a legitimate misunderstanding." U.S.Br.52. Neither argument has merit. While the government strains to make a test based on awareness of words' general "meaning and context" (U.S.Br.15) seem clear and predictable, in practice it would be an indeterminate modern-day "chancellor's foot" rule.

1. It is obvious what facts are relevant under a subjective-intent test—any that tend to establish the defendant's intent to cause fear. By contrast, it is difficult to discern what "facts and circumstances" would be "relevant" (U.S.Br.18) under the government's test, in part because it is even unclear who the reasonable person is: The person to whom the statement is addressed? Bystanders? And if bystanders count, must the speaker know of (or had reason to anticipate) their presence? Such uncertainties compound the inherent unpredictability of the "reasonable person test." Pet.Br.46-47.

The reasonable person test poses particular risks in the context of online speech, where, as here, statements are often reported by self-appointed "monitors" rather than participants in the conversation. See Student Press Law Center Amicus Br.18-19; see p.24, *infra*. Under such circumstances,

there is increased risk that those who report the speech and those who sit in judgment will be unfamiliar with relevant speech conventions. The government offers only unsupported generalities that jurors presumptively set aside preconceptions, U.S.Br.53, but it does not dispute research demonstrating that demographics and background affect jurors' threat perception. Pet.Br.47.

The government's "context" test raises still more questions here. Does the relevant "context" consider that petitioner made *hundreds* of posts, some of which used violent imagery but were obviously joking, or is it enough to consider just those isolated posts that Daniel Hall of the Dorney Park Patrol considered potentially threatening and provided to the FBI—typically without accompanying comments (*i.e.*, "context")? J.A.75-76, 139-140. Does the relevant "context" require considering that *none* of petitioners' "hundreds of [other] Facebook friends" (U.S.Br.2) reported his posts, users continued to "friend" him, and friends "liked" posts underlying his felony conviction? The government's test does not even make clear how much of this "context" the speaker must himself know. Must petitioner know that his wife and the FBI, who were not Facebook friends, were "monitoring" his posts? As part of his "onus" as a speaker, must petitioner assume the risk of unknown readers predisposed to view his posts as sinister?

While the government argues that speakers cannot avoid liability based on their "private and unexpressed intent," U.S.Br.39; *id.* at 16, 21, 25, 35, petitioner unquestionably went to lengths to say that

his posts should not be taken literally. When does a speaker undertaking such efforts—saying, essentially, "the following is not a threat"—satisfy his "onus to avoid communicating through true threats"? Petitioner began using a rapper persona to distance himself from postings; included disclaimers that the posts did not reflect the views "of Anthony Elonis the person," or were "fictitious lyrics" made in "exercising [his] constitutional right to freedom of speech," J.A.344, 331; included statements that it would be wrongful to punish his speech, J.A.333, 334; and even linked commercial works he referenced. J.A.333. Petitioner's posts were sent to "hundreds of Facebook friends" (but not *any* of the parties allegedly threatened), making his posts equivalent to a public reading in a club or cafe. As the government itself suggests, U.S.Br.54-55, "speech that is broadcast to a broad audience is less likely to be a true threat." *United States* v. *Carmichael*, 326 F. Supp. 2d 1267, 1289 (M.D. Ala. 2004) (collecting authorities).

2. While the government asserts that "[a] statement that is threatening to a reasonable person has little legitimate expressive value," U.S.Br.36, it does not deny that "commercial artists" have made valuable contributions using violent language. Nor does it deny the cathartic value of such speech for both speakers and sympathetic listeners. Pet.Br.53; Robin McKie, *Hip-hop therapy is new route to mental wellbeing, say psychiatrists*, The Observer (Oct. 11, 2014), http://goo.gl/YFreXx. The government suggests speakers can be required to "phrase[] [their ideas] in a different way" because "social discourse gains little, if anything, from its expression in the form," of violent language. U.S.Br.36-37. But the

First Amendment does not only protect discourse; it also protects self-expression, and statements containing "nothing of any possible value to society *** are as much entitled to the protection of free speech as the best of literature." *Entm't Merch.*, 131 S. Ct. at 2737 n.4 (internal quotation marks omitted). The government does not deny that forceful, violent, and offensive language has value in communicating intensity of emotion. See *Cohen*, 403 U.S. at 25. And the First Amendment plainly protects speech even when it creates fear. *E.g.*, *Nat'l Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43 (1977) (per curiam).

Although the government contends that it does not advocate a negligence standard, U.S.Br.29, it is hard to know what else to call a rule that bases criminal liability on what "a reasonable person would foresee" a listener would find frightening, J.A.301. The government acknowledges that its rule's application "cannot be predicted with complete certainty." *Id.* at 49. By imposing the "onus" on speakers to avoid crossing a concededly murky line, the government's rule chills protected speech. *Rogers* v. *United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring).

The only bright line the government appears to offer for its test is *celebrity*. It is hard, otherwise, to explain how it can dismiss Eminem's lyrics as "plainly hyperbole," U.S.Br.54, while petitioner's statements are "clearly threatening," *id.* at 17. The government asserts that statements by commercial artists "do not involve *** remotely analogous" circumstances, *id.* at 55, but cannot explain what

factors are missing. It is not the speaker's "evident emotional disturbance following the breakdown of his relationship with this wife." *Id.* at 55; see, *e.g.*, M.L. Elrick, *Eminem's dirty secrets*, Salon (July 25, 2000), http://goo.gl/CjD20O (noting artist's arrest for confrontation involving estranged wife). Nor is it that the statements are expressed publicly, although petitioner's audience is obviously much smaller.

While the government's rule purports to accommodate established "commercial artists" and authors, U.S.Br.54, the next generation risks felony liability by sharing writings with Facebook friends. The risk is all too real. A 31-year-old musician who habitually posted song lyrics to Facebook was recently detained when he posted lyrics to a song about the Virginia Tech shootings by the band Exodus. Harley Brown, *Man Jailed for Posting Lyrics to Facebook Says "It's Pretty Worrisome"*, Billboard (Sept. 10, 2014), http://goo.gl/z2yUP5. He was charged with a felony carrying a five-year mandatory-minimum sentence for posting words that Exodus could, with the same intent, post with impunity. *That* is a "bizarre result." U.S.Br.38 (internal quotation marks omitted). But it is the logical implication of making a speaker's intent irrelevant to punishment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Floor
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

DANIEL R. ORTIZ
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

JOHN P. ELWOOD
Counsel of Record
RALPH C. MAYRELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

MARK T. STANCIL
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500

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AMICUS CURIAE BRIEF

13-983

IN THE

Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION, THE CATO INSTITUTE, THE CENTER FOR DEMOCRACY & TECHNOLOGY, AND THE NATIONAL COALITION AGAINST CENSORSHIP, IN SUPPORT OF PETITIONER

Jack M. Balkin
David A. Schulz
Jonathan M. Manes
Abrams Institute for Freedom of Expression
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Joan E. Bertin
National Coalition Against Censorship
19 Fulton Street, Suite 407
New York, NY 10038

Steven R. Shapiro
Counsel of Record
Brian M. Hauss
Lee Rowland
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Emma J. Llansó
Center for Democracy & Technology
1634 I Street, NW, 11th Floor
Washington, DC 20006

Ilya Shapiro
Cato Institute
1000 Massachusetts Avenue, NW
Washington, DC 20001

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OTHER AUTHORITIES

Danah Boyd, *It's Complicated: The Social Lives of Networked Teens* (2014) 25

Dmitri Williams et al., *From Tree House to Barracks: The Social Life of Guilds in World of Warcraft*,
1 Games & Culture 338 (2006) 26

Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*,
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Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283 (2001) ... 19

Jorge Peña & Jeffrey T. Hancock, *An Analysis of Socioemotional and Task Communication in Online Multiplayer Video Games*, 33 Comm. Res. 92 (2006) ... 26

Oliver Wendell Holmes, Jr., *The Common Law* (1881) ... 17

Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225 (2006) ... *passim*

U.S. Census Bureau, *Computer and Internet Trends in America* (Feb 3, 2014), http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf ... 24

William Blackstone, *Commentaries on the Laws of England* (1769) ... 16, 17

Wikipedia, The Free Encyclopedia, *Internet*, https://en.wikipedia.org/wiki/Internet (last visited Aug. 7, 2014) ... 24

INTEREST OF *AMICI CURIAE* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court in free speech cases, both as direct counsel and as *amicus curiae*, including cases outlining the scope of the true threat doctrine. *See Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Virginia v. Black*, 538 U.S. 343 (2003). The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members.

The Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, and access to information as informed by the values of democracy and human freedom. It does not purport to speak for Yale University. The Institute's activities are both practical and scholarly, supporting litigation and law reform efforts as well as academic scholarship, conferences, and other events on First Amendment, new media, and related issues. The Institute is committed to robust protections for speech, including hostile, challenging, or unpopular speech, and is particularly concerned with maintaining and expanding protections for speech online.

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[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

The Cato Institute (Cato) was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is of central concern to Cato because the First Amendment is part of the bulwark for liberty that the Framers set out in the Constitution.

The Center for Democracy & Technology (CDT) is a non-profit public interest organization that advocates on free speech and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups that are united in their commitment to freedom of expression. (The positions advocated in this brief do not necessarily reflect the views of all of its member organizations.) Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of authors, teachers, students, librarians, readers, artists, museum-goers, and others around the

country. NCAC is particularly concerned about laws affecting online speech which are likely to have a disproportionate effect on young people who use social media as a primary means of communication, may engage in ill-considered but harmless speech online, and may employ abbreviated and idiosyncratic language that is subject to misinterpretation.

STATEMENT OF THE CASE

Petitioner Anthony Elonis was convicted on four of five counts in a federal indictment charging him with making threatening statements in violation of 18 U.S.C. § 875(c). The statements that led to the indictment are spelled out at length in Petitioner's brief, Pet. Br. at 9–16, and the opinions below. Pet. App. 1a–29a, 30a–48a, 49a–60a. All of the statements appeared on a Facebook page that Elonis had created using a pseudonym, and many took the form of rap lyrics. For present purposes, it is sufficient to note that many of the postings expressed violent thoughts and desires involving, among others, Petitioner's estranged wife.

Prior to trial, Elonis moved to dismiss the indictment on the ground that the government had failed to allege that his statements were made with an intent to threaten. The district court rejected his motion, citing Circuit precedent. Pet. App. 51a. At trial, Elonis asked the court to instruct the jury that "the government must prove that he intended to communicate a true threat." J.A. 21. The district court denied that request as well, and instructed the jury instead:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intent to inflict bodily injury or to take the life of an individual.

J.A. 301. Following his conviction, Elonis filed post-trial motions arguing that the government should have been required to prove subjective intent. J.A. 6.The district court again disagreed and sentenced Elonis to 44 months' imprisonment followed by three years' supervised release. J.A. 314–15.

The court of appeals affirmed, rejecting Elonis's argument that the Third Circuit precedent cited by the district court had been superseded by this Court's subsequent decision in *Virginia v. Black*, 538 U.S. 343 (2003), and disagreeing with Elonis's contention that "*Black* indicates a subjective intent to threaten is required." Pet. App. 16a.

SUMMARY OF ARGUMENT

This case involves a series of disturbing comments expressing Petitioner's violent thoughts and desires involving his estranged wife, among others. Those comments were undeniably crude and offensive. A properly charged jury might or might not have concluded that they also constituted a threat in context. The jury in this case was not properly charged, however. Instead, it was permitted to convict without a finding that Elonis intended his

comments to be understood as a threat. Because the First Amendment requires a showing of subjective intent to threaten as a predicate to criminal liability, Petitioner's conviction must be reversed.

To ensure that public discussion remains "uninhibited, robust, and wide-open," the First Amendment protects speech that is "vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). That protection does not extend to a speaker who threatens another with death or serious bodily harm. But while the distinction between protected speech and an unprotected "true threat" is easy to state, it can be exceedingly difficult to apply. Words are slippery things, and one person's opprobrium may be another's threat. A statute that proscribes speech without regard to the speaker's intended meaning runs the risk of punishing protected First Amendment expression simply because it is crudely or zealously expressed. Moreover, where the line between protected and unprotected speech is unclear, a speaker may engage in self-censorship to avoid the potentially serious consequences of misjudging how his words will be received. Statutes criminalizing threats without requiring the government to demonstrate a culpable *mens rea* are thus likely to sweep in speech protected under the First Amendment, including core political, artistic, and ideological speech. To ensure adequate breathing room for such speech, this Court should make clear that subjective intent to threaten is an essential element of any constitutionally proscribable true threat.

Establishing subjective intent to threaten as a constitutional *mens rea* requirement for true threats would not require any deviation from this Court's precedents. In both the true threat and incitement contexts, this Court has consistently recognized the importance of subjective intent to incite or threaten as an element of any statute criminalizing pure speech. Most recently, in *Virginia v. Black*, this Court stated that "[t]rue threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359 (internal quotation marks omitted). Although lower courts have divided over how to interpret *Black*, this Court's plain language and reasoning strongly support the conclusion that *Black* defined true threats to include only those statements made with the intent to threaten. Even if *Black* failed to decisively resolve the issue, however, the First Amendment principles undergirding this Court's decisions strongly caution against the criminalization of speech that was not intended as a threat, even if the speaker negligently failed to anticipate the listener's response.

Finally, the fact that the speech at issue in this case occurred online only underscores the need for a subjective intent requirement. Today, a significant amount of speech on political, social, and other issues occurs online, and is often abbreviated, idiosyncratic, decontextualized, and ambiguous. As such, it is susceptible to multiple interpretations, making a subjective intent requirement particularly necessary to ensure that protected online speech is neither punished nor chilled. As more and more

speech moves onto the Internet, the constitutional protections afforded to online speech will increasingly determine the actual scope of First Amendment freedoms enjoyed by our society. To protect those freedoms, this Court made clear in *Reno v. ACLU*, 521 U.S. 844 (1997), that the Internet enjoys the highest level of First Amendment protection. It should reaffirm that principle here by holding that subjective intent to threaten is an essential element of any true threat prosecution, regardless of whether the challenged statement occurred online or off.

ARGUMENT

I. SUBJECTIVE INTENT TO THREATEN IS AN ESSENTIAL ELEMENT OF ANY TRUE THREAT

A. This Court's Threat Jurisprudence Is Most Plausibly Read As Requiring Proof Of A Subjective Intent To Threaten.

This Court has recognized that there are certain "classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," but it has always cautioned that these categories must be "well-defined" and "narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *accord United States v. Stevens*, 559 U.S. 460, 468–69 (2010). In *Watts v. United States*, this Court added "true threats" to the catalogue of constitutionally proscribable speech. 394 U.S. at 707–08. *Watts* concerned a prosecution under 18 U.S.C. § 871(a), which prohibits knowing and willful threats against

the President, for a draft protester's statement at a rally against the Vietnam War that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. Observing that contextual factors indicated that the defendant was engaged only in "a kind of very crude offensive method of stating a political opposition to the President," and construing § 871(a) in light of First Amendment principles, the Court concluded that the statute's use of the term "threat" excluded the defendant's political hyperbole.[2]

This Court next addressed the scope of the true threat exception in *Virginia v. Black*. Under the most straightforward reading, *Black* clarified the true threat exception by requiring the government to demonstrate subjective intent to threaten as an essential *mens rea* element of the crime. Unmoored from the constraints of this subjective intent requirement, anti-threat statutes are neither "well-defined" nor "narrowly limited." Rather, they create a significant risk that the government will criminally sanction, and also chill, core First Amendment expression.

Black considered whether a state statute criminalizing cross burning with intent to intimidate,

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[2] Although *Watts* did not provide occasion for the Court to resolve whether intent to threaten is an essential element of a constitutionally proscribed "true threat," it expressed "grave doubts" about the lower court's conclusion that the statute's *mens rea* component required only general intent to utter the charged words. *Id.* at 707–08 (internal quotation marks omitted) (citing *Watts v. United States*, 402 F.2d 676, 686–93 (D.C. Cir. 1968) (Skelly Wright, J., dissenting)).

and which included a provision stating that the act of burning a cross itself constituted "prima facie evidence of an intent to intimidate," violated the First Amendment. 538 U.S. at 348. In scrutinizing the statute, the Court reiterated its holding in *Watts* that the First Amendment "permits a state to ban a true threat." *Id.* at 359 (internal quotation marks omitted). It then defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* The Court explained that "[t]he speaker need not actually intend to carry out the threat," because "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* at 359–60 (quoting *RAV v. City of St. Paul*, 505 U.S. 377, 388 (1992)). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat," the Court wrote, "where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death." *Id.* at 360 (emphasis added). With this definition in place, the Court held that the Virginia cross burning statute "does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.* at 362.

The majority then fractured over the constitutionality of the statute's prima facie evidence provision, which allowed the jury to infer intent to intimidate solely from the act of cross burning. A plurality of Justices viewed the prima facie evidence provision as facially unconstitutional because, in

removing the State's burden to prove the defendant's intent to intimidate, it "strip[ped] away the very reason why a State may ban cross burning with the intent to intimidate" and chilled core First Amendment speech by allowing the State to convict someone who burned a cross for political or artistic reasons. *Id.* at 365. Justice Scalia disagreed that the prima facie evidence provision was facially unconstitutional, but agreed that an as-applied challenge to the prima facie evidence provision could lie where defendants were convicted for burning crosses without the requisite intent to intimidate. *Id.* at 379–80 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part). Finally, Justice Souter, joined by Justices Kennedy and Ginsburg, argued that the entire statute should be struck down as content discriminatory. *Id.* at 385–86.

In *Black*'s wake, lower courts have divided over whether the decision requires the government to demonstrate subjective intent to threaten as a constitutionally essential element of any true threat prosecution, or whether the Court's ruling was limited to the specific statute before it. Like the Third Circuit in this case, most Circuits to consider the issue have concluded that "*Black* did not work a 'sea change,' tacitly overruling decades of [Circuit] case law by importing a requirement of subjective intent into all threat-prohibiting statutes." *United States v. Martinez*, 736 F.3d 981, 987–88 (11th Cir. 2013).[3] *See also United States v. Jeffries*, 692 F.3d

[3] As Petitioner points out, the requirement of subjective intent has deep historical roots. If anything, recent cases to the

473, 479–80 (6th Cir. 2012) ("*Black* does not work the sea change that Jeffries proposes."), cert. denied, 134 S. Ct. 59 (2013); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("We are not convinced that *Black* effected the change that White claims."); *accord United States v. Nicklas*, 713 F.3d 435, 439–40 (8th Cir. 2013) (quoting *Jeffries*); *cf. United States v. Clemens*, 738 F.3d 1, 12 (1st Cir. 2013) (holding, on plain error review, that "[a]bsent further clarification from the Supreme Court, we see no basis to venture further and no basis to depart from our circuit law").

Other courts have disagreed, reasoning that the "clear import" of *Black* "is that only *intentional* threats are criminally punishable consistently with the First Amendment." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (O'Scannlain, J.). *See also United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.") (Reinhardt, J.); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (stating that "an entirely objective definition" of true threats may "no longer [be] tenable" after *Black*); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (stating that a constitutionally proscribed true threat "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" (quoting *Black*, 538 U.S. at 360)); *White*, 670 F.3d at 520 (Floyd, J., concurring in part and dissenting in part) ("*Black* . . . makes our

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contrary are themselves a departure from this original understanding. Pet. Br. at 36–39.

purely objective approach to ascertaining true threats no longer tenable.").

Although courts adhering to the majority view of *Black* have been reluctant to revise their prior precedents in the absence of plain command, the minority view provides the better reading of the decision. First, as mentioned above, *Black* expressly defined true threats as "those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359 (emphasis added). As the Ninth Circuit has held, "[a] natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *Cassel*, 408 F.3d at 631. Some courts have maintained that *Black*'s discussion of specific intent was descriptive rather than normative. According to this theory, the Court included a specific intent element in its true threat definition only because it was there "addressing a *specific intent statute* that requires, as an element of the offense, a specific intent to intimidate." *White*, 670 F.3d at 517 (Duncan, J., concurring). This interpretation of *Black* is difficult to square with the decision's language and structure. The Court's true threat definition makes no reference to a particular statute or set of facts, but rather lays out a general explanation of what the concept of a true threat entails (specific intent to threaten) and does not entail (specific intent to carry out the threat). Moreover, the definition of a true threat occurs in Part III.A of the majority opinion, which defines the general contours of the First Amendment analysis,

rather than Part III.B, which applies that analysis to the statute under consideration.

References to specific intent echo throughout the majority and plurality opinions in *Black*. The majority, for example, described "intimidation" as "a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360. It makes little sense to impose this intent to threaten requirement for one type of true threat but not others. *See White*, 670 F.3d at 522 (opinion of Floyd, J.). Indeed, "[t]he Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another 'prima facie evidence of an intent to intimidate.'" *Cassel*, 408 F.3d at 631.

In striking down the prima facie evidence provision as facially unconstitutional, the plurality explained that the provision violates the First Amendment because it "does not distinguish between a cross burning done with the *purpose* of creating anger or resentment and a cross burning done with the *purpose* of threatening or intimidating a victim." *Black*, 538 U.S. at 366 (emphases added). *See also id.* at 367 ("The provision . . . ignores all of the contextual factors that are necessary to decide whether a particular cross burning *is intended to intimidate*. The First Amendment does not permit such a shortcut." (emphasis added)). "If the First

Amendment did not impose a specific intent requirement, 'Virginia's statutory presumption was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it." *White*, 670 F.3d at 523 (opinion of Floyd, J.) (quoting Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217).

The other opinions in *Black* similarly reflect a consensus on the Court that intent to threaten is an essential element of any true threat. Justice Scalia, in his partial concurrence, disagreed with the Court's facial invalidation of the statute, but agreed that the jury instructions in Black's case, which stated that "[t]he burning of a cross, *by itself*, is sufficient evidence from which you may infer the required intent," were constitutionally deficient because they made it "impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it—*including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate—or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross." 538 U.S. at 377, 380 (opinion of Scalia, J.). And Justice Souter, in his partial concurrence, argued that the prima facie evidence provision rendered the entire statute facially unconstitutional because "its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Id.* at 385 (opinion of Souter, J.). *See also id.* at 386 ("What is significant is

that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one."). Thus, eight of the Justices in *Black* "agreed that intent to intimidate is necessary [for true threats] and that the government must prove it in order to secure a conviction." *Cassel*, 408 F.3d at 632 & n.7.

B. First Amendment Principles Favor A Subjective Intent To Threaten Requirement.

Even if *Black* did not already settle the issue, First Amendment principles compel the conclusion that subjective intent to threaten is an essential element of any true threat. Under the purely objective standard for evaluating true threats, a speaker may be "subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention." *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring). In other words, it is essentially a "negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Id.* Standing alone, this objective analysis "asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have

known others would see it that way." *Jeffries*, 692 F.3d at 484-85 (Sutton, J., concurring *dubitante*).[4]

This Court has frequently noted the importance of intent in criminal law. "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil." *Morissette v. United States*, 342 U.S. 246, 251–52 (1952). It is a principle with ancient lineage. *See* 4 William Blackstone, *Commentaries on*

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[4] Courts applying a purely objective standard have split over whether to apply a reasonable speaker test or a reasonable listener test. *See United States v. Saunders*, 166 F.3d 907, 913 & n.6 (7th Cir. 1999) (collecting cases). Under the reasonable speaker test, a statement is a true threat if it was made "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (internal quotation marks omitted). The reasonable listener test, by contrast, asks only whether "whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (internal quotation marks omitted). Only the reasonable speaker standard qualifies as a negligence-based standard. The reasonable listener standard is more appropriately characterized as a strict liability standard because it would allow a jury to convict a speaker "for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant." *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997). *See also* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1246 (2006) ("In reasonable listener jurisdictions, the only intent element is that the statement was knowingly made.").

the Laws of England 21 (1769) ("And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all."); Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881) ("Even a dog distinguishes between being stumbled over and being kicked."). Thus, absent an explicit statutory direction to the contrary (which may raise its own constitutional issues), this Court presumes an intent requirement for criminal laws, *Morrisette*, 342 U.S. at 250, particularly where *mens rea* serves as the "crucial element separating legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (interpreting the term "knowingly," as used in the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252, to require the government to demonstrate that defendants charged with trafficking in child pornography were aware of both the minority of the performers and the sexually explicit nature of the material).

When a criminal prosecution is premised on speech, as here, the general presumption in favor of a subjective intent requirement is reinforced by this country's constitutional tradition of allowing breathing room for the free exchange of ideas. *See Rogers*, 422 U.S. at 44, 47 (opinion of Marshall, J.) (stating that the Court "should be particularly wary of adopting . . . a [negligence] standard for a statute that regulates pure speech," because a purely "objective construction" of true threats "would create a substantial risk that crude, but constitutionally protected, speech might be criminalized" or chilled).

Anyone conversant with public discourse in this country, particularly as expressed on Internet public comment threads, is undoubtedly familiar with Americans' frequent resort to strong and even offensive language. "The language of the political arena," in particular, "is often vituperative, abusive, and inexact," and "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted).[5] Sometimes there will be sufficient contextual detail to make it objectively clear whether a speaker is issuing a true threat or is engaged in some form of protected First Amendment expression. But many times—and particularly in the case of Internet speech, where the context surrounding a particular statement on a message board or comments thread may be exceedingly thin or difficult to ascertain—whether a given statement qualifies as a threat will be in the eye or ear of the beholder. In those circumstances, the purely objective true threat standard provides insufficient breathing for protected First Amendment expression. *Watts*, 394 U.S. at 708.

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[5] Although this case does not involve speech advocating a particular political or ideological agenda, the question of whether subjective intent to threaten is required to characterize speech as a true threat outside the First Amendment will likely determine the rule for political and ideological speech as well. As this Court has explained, the determination of whether particular speech lies wholly outside the First Amendment is a categorical one that does not turn on a "simple cost-benefit analysis." *Stevens*, 559 U.S. at 471.

Moreover, because the jury in a true threat case is likely to hold the common prejudices of its place and time, the threat of prosecution under the purely objective standard hangs most heavily over the heads of those advocating unpopular or unconventional ideas. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). The risk of criminal prosecution is especially great for those holding unpopular or controversial views whose "violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening." *White*, 670 F.3d at 525 (opinion of Floyd, J.); *cf. Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

To avoid that risk, many speakers will self-censor. "The purely objective approach allows speakers to be convicted for negligently making a threatening statement—that is, for making a statement the speaker did not intend to be threatening, but that a reasonable person would perceive as such. This potential chills core political speech." *White*, 670 F.3d at 524 (opinion of Floyd, J.) *See also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 316 (2001) ("Punishing merely negligent speech will chill legitimate speech by forcing speakers to steer clear of any questionable speech."). "Put simply, an

objective standard chills speech." Crane, *supra* note 4, at 1273.

This Court has addressed similar First Amendment problems in the incitement context by imposing subjective intent as an essential element of criminal liability. For example, in *Brandenburg v. Ohio*, this Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation [i.e., incitement] except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," and stated that any statute failing to recognize these requirements "sweeps within its condemnation speech which our Constitution has immunized from governmental control." 395 U.S. 444, 448 (1969) (per curiam); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (concluding that the defendant's speech was not incitement, in part because "there was no evidence or rational inference from the import of the language that his words were intended to produce, and likely to produce, imminent disorder").[6] And, in *Claiborne Hardware*, the Court

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[6] The Court has also used this "breathing room" rationale to justify subjective intent requirements for other statutes criminalizing pure speech. In *United States v. Alvarez*, for example, two Members of this Court explicitly recognized that statutes criminalizing false speech should be interpreted as requiring the government to demonstrate that the speaker made the false statements "with knowledge of their falsity and with the intent that they be taken as true," so as to "provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

held that although a boycott organizer's impassioned statements for black citizens to support the boycott "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence," the "emotionally charged rhetoric of [his] speech did not transcend the bounds of protected speech set forth in *Brandenburg*," because there was "no evidence—apart from the speeches themselves—that [he] authorized, ratified, or directly threatened acts of violence." 458 U.S. at 927–29. "To rule otherwise," the Court recognized, "would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 928 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Requiring the government to demonstrate subjective intent to threaten in true threat cases would not substantially hinder its ability to prosecute actually intended threats. As in most criminal prosecutions, where intent is an essential element of the crime, the jury may infer the defendant's *mens rea* from the totality of the evidence, including the statement itself. The subjective intent requirement "simply permit[s] the speaker an opportunity to explain his statement—an explanation that may shed light on the question of whether this communication was articulating an idea or expressing a threat." Crane, *supra* note 4, at 1275. In some cases, the defendant might have a perfectly plausible explanation for her choice of words. *See Fulmer*, 108 F.3d at 1490 (defendant argued that his allegedly threatening statement to an FBI agent—"[t]he silver bullets are coming"—was code for clear-cut evidence of wrongdoing). In others, the defendant might argue that she lacked the requisite mental

capacity to subjectively intend a threat. *See United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988) (conditioning the viability of the defendant's diminished capacity defense on the court's conclusion that 18 U.S.C. §§ 875 and 876 are specific intent statutes); *see generally* Crane, *supra* note 4, at 1236 & nn. 44–47.

Critics of the subjective intent requirement have generally argued that it gives insufficient weight to the harm caused by objectively threatening statements, regardless of whether those statements were intended to threaten. *See, e.g.*, *Jeffries*, 692 F.3d at 480 ("What is excluded from First Amendment protection—threats rooted in their effect on the listener—works well with a test that focuses not on the intent of the speaker but on the effect on a reasonable listener of the speech."). To be sure, the government has a legitimate interest in "protecting individuals from the fear of violence" and "from the disruption that fear engenders," as well as "the possibility that the threatened violence will occur." *RAV v. City of St. Paul*, 505 U.S. 377, 388 (1992). In particular, violence against women represents a serious societal problem that needs to be addressed.[7] But the First Amendment constrains the government's ability to advance that interest through means that punish or chill protected expression. That is the risk created by the government's proposed rule in this case, which will not be limited to these facts. "Statements deemed threatening in nature only upon

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[7] *See United States v. Morrison*, 529 U.S. 598, 629–630 (2000) (Souter, J., dissenting) (citing statistics regarding violence against women in the U.S.).

'objective' consideration will be deterred [by 18 U.S.C. § 871] only if persons criticizing the President are careful to give a wide berth to any comment that might be construed as threatening in nature. And that degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Rogers*, 422 U.S. at 47–48 (opinion of Marshall, J.). Requiring the government to demonstrate subjective intent to threaten as part of any true threat prosecution strikes the constitutionally appropriate balance between the government's interest in protecting against the harms caused by threats and the country's constitutional tradition of encouraging the free and uninhibited exchange of ideas.

II. A SUBJECTIVE INTENT REQUIREMENT IS PARTICULARLY IMPORTANT FOR PROTECTING ONLINE SPEECH

For many people throughout the United States—indeed, the world—the Internet has become the predominant means for communication and public discourse. "This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue." *Reno*, 521 U.S. at 870. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Id.* When this Court decided *Reno* in 1997, the government estimated that "[a]s many as 40 million

people use the Internet." *Id.* (alteration in original) (internal quotation marks omitted). By 2010, "22 percent of the world's population had access to computers[,] with 1 billion Google searches every day, 300 million Internet users reading blogs, and 2 billion videos viewed daily on YouTube." Wikipedia, The Free Encyclopedia, *Internet*, https://en.wikipedia.org/wiki/Internet (last visited Aug. 7, 2014). In the United States, 74.8 percent of all households access the Internet at home in 2012, up from 18.0 percent in 1997, and 45.3 percent of individuals 25 and older were using smartphones. U.S. Census Bureau, *Computer and Internet Trends in America* (Feb 3, 2014), http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf.

Now, more than ever, "[t]he content on the Internet is as diverse as human thought." *Reno*, 521 U.S. at 870 (internal quotation marks and citation omitted). And, just as with offline speech, the types of content available "defy easy classification." *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996). Individuals can communicate with each other and the broader public through all manner of Internet-based media, including email, chat rooms, direct messaging services, newsgroups, videos, blogs, websites, games, social networks such as Facebook, and remote hosting services for shared files. The ideas, opinions, emotions, actions, and desires capable of communication through the Internet are limited only by the human capacity for expression. If First Amendment protections are to enjoy enduring relevance in the twenty-first century, they must apply with full force to speech conducted online. As this Court made absolutely clear in *Reno*, there is "no

basis for qualifying the level of First Amendment scrutiny that should be applied" to speech conducted on the Internet. *Reno*, 521 U.S. at 870.

The reasons for imposing a subjective intent to threaten requirement on true threat prosecutions apply with equal, if not greater, force to online speech than they do to offline speech. First, online speakers often have less information about the composition of the audience they are targeting with a communication. A message posted to a publicly accessible website or mailing list is potentially viewable by anyone with an Internet connection anywhere in the world. A speaker may post a statement online with the expectation that a relatively small number of people will see it, without anticipating that it could be read—and understood very differently—by a much broader audience.[8]

Second, online communications can easily become decontextualized by third parties. A speaker might send an email to one person, only to see that person forward the message to dozens of others or post it on a public mailing list. Or a speaker may

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[8] *See e.g.*, Danah Boyd, *It's Complicated: The Social Lives of Networked Teens* 31–32 (2014) ("In speaking to an unknown or invisible audience, it is impossible and unproductive to account for the full range of plausible interpretations [of a statement]. Instead, public speakers consistently imagine a specific subset of potential readers or viewers and focus on how those intended viewers are likely to respond to a particular statement. As a result, the imagined audience defines the social context. In choosing how to present themselves before disconnected and invisible audiences, people must attempt to resolve context collapses or actively define the context in which they're operating.").

post a comment on his own Facebook profile page, intending it to be seen only by those friends he has allowed to view his page, and later find that one of those friends has taken a screen-capture of his comments and posted the image to an entirely different website. These actions, completely beyond the control of the speaker, place the speaker's statements in front of audiences that the speaker had no expectation or intent to reach. Further, such decontextualization circumvents any effort by a speaker to provide additional context, outside the plain words of the statement, that would make the non-threatening intent of the statement clear. Different online communication fora will often develop their own conventions for expressing emotion and sarcasm. *See* Jorge Peña & Jeffrey T. Hancock, *An Analysis of Socioemotional and Task Communication in Online Multiplayer Video Games*, 33 Comm. Res. 92, 98 (2006) ("[Computer-mediated communication] participants tend to express themselves employing collective conventions, such as a shared jargon and argot . . . . CMC conventions can be considered as surrogates for nonverbal communication and can be employed to express emotions, moods, humor, sarcasm, and irony."). Even within a single online environment, such as a multiplayer online game, sub-communities will form and develop their own communication styles. *See* Dmitri Williams et al., *From Tree House to Barracks: The Social Life of Guilds in World of Warcraft*, 1 Games & Culture 338, 357 (2006). Statements made to a close-knit community could easily be misinterpreted when taken out of context or read by a newcomer who is not yet familiar with the conventions or practices of that community. Thus,

use of an objective test for online communication would inevitably chill constitutionally protected speech, as speakers would bear the burden of accurately anticipating the potential reaction of unfamiliar listeners or readers.

A subjective intent requirement addresses this problem by allowing a jury to consider more evidence contextualizing the online comment than could be considered under a purely objective standard, including the defendant's intended audience, other remarks clarifying the challenged statement's meaning, the defendant's motive for making the statement, and so forth. And, just as with offline speech, a requirement that the government demonstrate a speaker's subjective intent to threaten would not unduly impede its ability to prosecute speakers who intentionally threaten others. While a speaker cannot control what happens to her statement after she posts it, there are certainly a number of judgments speakers make each time they engage in online communication. These choices are often relevant to both the objective import of the speaker's words *and* the speaker's subjective intent in posting them. For example, a speaker may decide to send an email or a one-to-one chat message directly to another individual with whom he has a preexisting relationship. Or a speaker may decide to post a message to a personal social media account, access to which is restricted to an audience of his choosing. A speaker may include her message on an issue-specific message board, and the message may be on- or off-topic for that forum. A speaker may also decide to publish her message on a platform that is publicly visible, and may take steps to increase the chances that the message is viewed by a particular

individual or group (for example, posting publicly on Twitter and including a hashtag that is relevant to the topic or including another person's username in the post). Each of these scenarios presents different, situation-specific information about a speaker's choices regarding the scope, reach, and intended audience of her statement—precisely the sort of evidence that could be relevant to a jury's assessment of the speaker's subjective intent.

CONCLUSION

For the foregoing reasons, this Court should hold that subjective intent to threaten is an essential element of any true threat, regardless of whether the relevant statement occurred on the Internet or elsewhere. Accordingly, the judgment below should be reversed.

Respectfully submitted,

Steven R. Shapiro
Counsel of Record
Brian M. Hauss
Lee Rowland
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Jack M. Balkin
David A. Schulz
Jonathan M. Manes
Abrams Institute for Freedom of Expression
Yale Law School
P.O. Box 208215
New Haven, CT 06520
(203) 432-9387

Ilya Shapiro
Cato Institute
1000 Massachusetts
Avenue, NW
Washington, DC 20001
(202) 842-0200

Emma J. Llansó
Center for Democracy
& Technology
1634 I Street NW,
11th Floor
Washington, DC 20006
(202) 637-9800

Joan E. Bertin
National Coalition Against
Censorship
19 Fulton Street,
Suite 407
New York, NY 10038
(212) 807-6222

Dated: August 22, 2014

AMICUS CURIAE BRIEF

No. 13-983

IN THE

Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENT

STEVE M. FREEMAN
LAUREN A. JONES
SETH M. MARNIN
ANTI-DEFAMATION LEAGUE
605 Third Avenue, 10th Floor.
New York, N.Y. 10158
(212) 885-7700

CHRISTOPHER WOLF*
KEITH O'DOHERTY
ARTHUR KIM
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719
christopher.wolf@hoganlovells.com

Counsel for Amici Curiae
*Counsel of Record

(Additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional Counsel:

FREDERICK M. LAWRENCE
BRANDEIS UNIVERSITY
PRESIDENT AND PROFESSOR
OF POLITICS
415 South Street, M/S 100
Waltham, MA 02453-2728
(718) 736-3009

Of Counsel

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BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

The Anti-Defamation League (ADL)[1] was founded in 1913 to combat anti-Semitism and other forms of

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the prepara-

discrimination, to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment for all. Today, ADL is one of the world's leading civil and human rights organizations, combating all types of prejudice and working to eradicate hate both online and offline. ADL has long played a leading role in raising awareness about hate on the Internet and working with major industry providers to address the challenge it poses. In September 2014, ADL released Best Practices for Responding to CyberHate, an initiative establishing guideposts for the Internet community to help prevent the spread of hate online.[2] This initiative was embraced by Facebook, Google/YouTube, Microsoft, Twitter, and Yahoo, reflecting the industry's concern about the growing problem of online hate speech, including anti-Semitism, anti-Muslim bigotry, racism, homophobia, misogyny, xenophobia, and other forms of online hate.

ADL is also a leader in developing anti-cyberbullying training, curriculum, and resources for youth, educators, youth providers, and adult family members. After authoring a model cyberbullying prevention statute, ADL created CyberALLY, a cyberbullying prevention program for middle and high school students, and Internet Guidelines for Families to help keep adolescents safe online.

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tion and submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

[2] The Best Practices are available at http://www.adl.org/cyberhatebestpractices.

As a civil rights advocacy organization, ADL is committed to the preservation of democratic freedoms and the constitutional rights that gird them, including the rights to freedom of speech and freedom of expression. ADL's mission and work make it keenly aware of the importance of effectively distinguishing between speech protected by the First Amendment and unlawful true threats. By properly allowing a fact finder to consider the entire context of a case, an objective inquiry achieves this goal.

SUMMARY OF ARGUMENT

Using a reasonable-person, objective inquiry to determine whether threats are "true threats" remains faithful to the purpose of the true threat exception to the First Amendment – protecting individuals from fear of violence and the disruption caused by such fear, while at the same time avoiding unnecessarily chilling speech. The plain language of the statute at issue, 18 U.S.C. § 875(c), makes unlawful "*any* threat to injure the person of another." (emphasis added.) Because the jury in this case found that petitioner's Facebook posts conveyed an objective intent to harm his wife, local law enforcement, elementary school children, and an FBI agent, his conduct plainly fell within the scope of "any threat."

The First Amendment does not change that analysis. This Court long has recognized that the State may punish "true threats," including a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," even when the speaker does not actually intend to carry out the threat. *Virginia v. Black*, 538

U.S. 343, 360 (2003). True threats fall outside the protections of the First Amendment because a prohibition on such speech "protects individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Id.* (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 388 (1992)).

An objective intent inquiry more effectively distinguishes true threats from constitutionally protected speech. As noted, fear of violence and the resulting societal disruption distinguish true threats from protected speech. *Id.* Thus, a test that accurately and effectively identifies true threats should focus on whether the speech at issue creates such fear and disruption. An objective test has this proper focus. It allows a fact finder to consider the full circumstances, such as the impact on the audience and historical context, and to weigh all the evidence, including information about the speaker's state of mind. With all this in mind, a fact finder then determines if the speech at issue has reasonably created the fear and disruption that separates true threats from protected speech. By contrast, improperly focusing on subjective intent treats a subset of disruptive speech – that which lacks proof of subjective intent – as protected speech. Accordingly, by not focusing solely on a speaker's state of mind, an objective inquiry more effectively separates protected speech from true threats.

An objective inquiry does not unnecessarily chill speech. By proscribing speech that instills fear in a target and causes societal disruption, rather than focusing on a hard-to-discern state of mind, an

objective test creates a more predictable standard. This predictability reduces any potential chilling effect. In addition, there is no liability under an objective inquiry for unforeseeable or unreasonable audience reactions.

This Court has never found that the First Amendment requires proof of subjective intent for true threat liability. True threats made with subjective intent are only one "type" of true threat. *Black*, 538 U.S. at 360. A government may choose, as it has in the past, to proscribe only this type of true threat. *See id.*; *Watts v. U.S.*, 394 U.S. 705, 706 (1969). The statute at issue here, however, prohibits "any threat," not just those accompanied by proof of subjective intent. 18 U.S.C. § 875(c). Accordingly, requiring proof of subjective intent would unnecessarily limit the plain language of the statute.

Because an objective test effectively distinguishes between unlawful true threats and protected speech, this Court should affirm.

ARGUMENT

I. TRUE THREATS FALL OUTSIDE FIRST AMENDMENT PROTECTIONS.

Free speech is a cornerstone of American democracy. Our nation's "profound national commitment" to "uninhibited, robust, and wideopen" debate recognizes that public discourse may well be "vehement, caustic [or] unpleasant[]" and yet still be protected by the First Amendment. *Watts*, 394 U.S. at 708. The expression of unpopular ideas or viewpoints is at the heart of our democracy and is rightfully protected by the First Amendment.

First Amendment protections, however, are not absolute. Certain categories of speech are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," and thus fall outside the protections of the First Amendment. *City of St. Paul*, 505 U.S. at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). The government, consistent with the Constitution, may regulate the following categories of speech and expression:

> advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called "fighting words"; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent.

United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (internal citations omitted). "True threats" are on this list; and as this Court has explained, they may be proscribed in order to protect "from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur." *Black*, 538 U.S. at 344; *Watts*, 394 U.S. at 707-08.

True threats are not simply extreme or unpopular opinions. Nor are they directionless or open-ended. They are targeted. They identify a specific individual or group. They intimidate others and prevent them from thinking, acting, and speaking freely. *Black*, 538 U.S. at 359-60; *Watts*, 394 U.S. at 707. By

doing so, true threats instill fear, disrupt society, and absorb law enforcement resources. In order to prevent this fear and societal disruption, a government may prohibit all true threats, not just those made with proof of subjective intent.

II. IT IS MORE DIFFICULT TO DISCERN A SPEAKER'S TRUE INTENT THROUGH NEW MEDIA.

New mediums of communication, such as those at issue here, have changed the way people interact. Today, the world lives both online and offline. While these worlds differ, they are fundamentally interconnected and together make up the full sphere of modern social and public interaction. Indeed, in the Internet age, it is nearly impossible to avoid online communications. From business communications to schoolwork, dating, and friendships, interaction through new media is as much a part of everyday life as face-to-face interaction. Today, it is virtually impossible to function fully "off the grid."

The nature of online interactions – in which people often connect without face-to-face contact, sometimes with fewer than 140 character messages, or with photos that disappear in seconds – is changing the way people communicate information. In this context, discerning a speaker's subjective intent is particularly difficult. New media communications often lack the contextual clues and associated nonverbal communication inherent in face-to-face interaction. For example, body language and facial expressions cannot typically be judged online. Tone is often hard to decipher. There may be no clear distinction between an angry epithet and a lyric rapped to a beat, which a listener would clearly hear

in a face-to-face interaction. Because new media communications are often drafted in private, there are frequently no third-party witnesses to the contemporaneous context of a message. It is, therefore, often more difficult with new media for the audience to distinguish whether a message has been purposefully drafted to intimidate, crafted as an artistic expression, or written in jest.

In addition to opening new lines of communication, new media has also lowered many of the traditional barriers to intimidation and other true threats. With new media, an individual can threaten and harass from the comfort of home. Because it is easier to act outside of the public's view, there is less pressure to comport with traditional social norms that may have previously curtailed truly threatening behavior. *See, e.g.*, L. B. Lidsky, *Incendiary Speech and Social Media*, 44 Tex. Tech. L. Rev. 147, 149 (2011) (noting that "the actual or practical anonymity" of social media communications "fosters a sense of disinhibition in those contemplating violence"). Further, connecting with those that share hateful perspectives has become far easier in the Internet age. *See, e.g.*, A. H. Foxman & C. Wolf, *Viral Hate: Containing Its Spread on the Internet*, 14 (2013) ("Don Black, former grand dragon of the Ku Klux Klan, noted that, 'as far as recruiting, [the Internet has] been the biggest breakthrough I've seen in the 30 years I've been involved in [white nationalism].'"). This leads to validation of hate and empowerment of tendencies to intimidate or act on violent thoughts. *See id.* at 29-30; *see also* Lidsky, *Incendiary Speech and Social Media*, *supra*, at 149 (noting that interactions through subcommunities on social media "may

serve to foster group violence or to 'normalize' individual violence"). Online supporters often encourage or enable would-be harassers to intimidate and threaten. *See, e.g.*, Lidsky, *Incendiary Speech and Social Media*, *supra*, at 157.

New media communications have lower cost, greater reach and specificity, and can be more persistent and pervasive. An attacker can make contact with a specific target, virtually anywhere, without ever having to know his or her physical location. An attacker has no need to track a victim, travel any distance, or expend effort ensuring that the intimidation reaches its intended target. With new media communications, the message instantly finds its target, regardless of time, distance, or location. And with social media, such as Facebook, an individual can threaten a target privately, or in full view of his or her peers. In these ways, the Internet has lowered the barriers to issuing a true threat.

And yet, in many ways, these new social media interactions mirror traditional social interactions. With new media, one can choose to interact with the public at large such as with a tweet on Twitter, much as in a town square or a shopping mall; with a reduced audience on a Facebook wall, such as at a private party; or with an exclusive audience through a personal message, such as in a private conversation. Unlike older forms of media, such as television broadcasting, new media can be as widely broadcast or as directly targeted as a user wishes.

Thus, true threats via new media, as much as those made face-to-face, can induce fear in a target, divert societal resources in the form of law enforcement

time and effort, and put targets in jeopardy of actual physical injury. *See, e.g.*, S. K. Schneider, *et al.*, *Cyberbullying, School Bullying, and Psychological Distress: A Regional Census of High School Students*, 102 Am. J. Public Health 171, 175 (2012) (finding that "victims of cyberbullying alone reported more distress than did school bullying victims alone"); *see also* D. K. Citron, *Intermediaries and Hate Speech: Fostering Digital Citizenship for our Information Age*, 91 B.U. L. Rev. 1435, 1448-50 (2011) (discussing examples of the disruptive effect of threatening behavior through new media); D.K. Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 69-81 (2009) (same). Indeed, because threats through new media communications can be virtually omnipresent, they are often more damaging than those made through traditional mediums. Cyberbullying, for example, can become so pervasive that it can lead to psychological damages and self harm. *See, e.g.*, S. K. Schneider, *et al.*, *Cyberbulling, School Bullying, and Psychological Distress*, *supra*, at 175 (finding that "there is a robust relationship between cyberbullying victimization and all forms of psychological distress along the continuum from depression to suicide attempts"); *see also* C. Hay *et al.*, *Bully Victimization and Adolescent Self-Harm: Testing Hypothesis from General Strain Theory*, 39 J. Youth & Adolescence 5, 446 (2010); S. Hinduja *et al.*, *Bullying, Cyberbullying, and Suicide*, 14 Archives of Suicide Research 3, 206 (2010). It is this kind of targeted fear and disruption that the true threat exception was created to prevent.

Because of these ever-changing methods of communication, evolving social norms, difficulties dis-

cerning a speaker's intent, and profound impacts on a target, it is crucial to fully consider all context when evaluating threatening speech though new media. Only by doing so can speech that causes fear and disruption be properly separated from protected speech.

III. AN OBJECTIVE INQUIRY MORE EFFECTIVELY DISTINGUISHES TRUE THREATS FROM PROTECTED SPEECH, WITHOUT UNNECESSARILY CHILLING SPEECH.

The First Amendment does not require this Court to read subjective intent into the statute at issue here. To the contrary, an objective inquiry fulfills the purpose of the true threat exception by effectively distinguishing speech that causes fear and disruption from protected speech, is true to the plain language of the statute, and aligns with this Court's precedents.

A. Neither The Statute Nor This Court's Precedent Require Proof Of The Defendant's Subjective Intent To Threaten.

Congress elected not to include a subjective intent requirement in 18 U.S.C. § 875(c). This Court should refrain from reading one into the statute. The statute states:

> Whoever transmits in interstate or foreign commerce any communication containing *any threat* to kidnap any person or *any threat* to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 875(c) (emphases added). Unlike the statutes at issue in *Watts* and *Black*, the plain language of Section 875(c) does not require proof of subjective intent. *See Watts*, 394 U.S. at 706 (prohibiting, inter alia, "knowingly and willfully" threatening the President); *Black*, 538 U.S. at 348 (prohibiting cross burning "with the intent of intimidating any person or group of persons"). Here, the statute merely requires transmission of "any threat."

This Court has never held that the First Amendment requires proof of subjective intent for true threat liability. In *Black*, this Court resolved a different question of intent raised by the statute. Unlike the statute at issue in this case, the statute in *Black* explicitly required proof of subjective intent and provided that "any" cross burning was "prima facie evidence of intent to intimidate." 538 U.S. at 348. This Court viewed and discussed the circumstances of that case through the lens of the statutorily required intent. It had no need to address whether the First Amendment separately required proof of subjective intent because the statute set the necessary level of intent.

Further, this Court noted that true threats made with subjective intent were only a "type" of true threat. *See Black*, 538 U.S. at 360 ("a *type* of true threat" is one made "with the intent of placing the victim in fear of bodily harm or death" and "'[t]rue threats' *encompass* those statements where the speaker means to communicate" a threat) (emphases added). This Court did not find that this was the only type of true threat, nor all that true threats "encompass." Indeed, this Court reaffirmed that the entire class of true threats are proscribable. *Id.* at

361-62. Thus, in order to fully protect from the fear and disruption that true threats create, the government may prohibit all "types" of true threats, not just those accompanied by proof of subjective intent. The statute at issue in this case does just that, proscribing "any threat." 18 U.S.C. § 875(c). While "any threat" certainly includes true threats made with subjective intent, the plain meaning is not limited to this type of true threat. Thus, requiring proof of subjective intent would stray from the plain language of the statute.

B. An Objective Inquiry Draws A Clear Distinction Between Protected Speech And True Threats And Allows A Fact Finder To Fully Consider All The Circumstances.

Distinguishing between true threats and protected speech requires a highly factual, case-by-case determination. *Watts*, 394 U.S. at 707-08; *Black*, 538 U.S. at 364-67. In *Black*, this Court found that prejudging evidence would "ignore[] all of the contextual factors" related to the alleged threat and therefore "blur[] the line" between protected speech and true threats. *Id.* at 365, 367 (faulting statute at issue for deeming a cross burning as always being prima facie evidence of intent to threaten). *Black* explained that placing special evidentiary weight on one piece of evidence, in every case, would result in not properly considering all the circumstances. *Id.* at 367. There, the Court considered the full context, including the history of cross burning and related violence, the location of the land where the cross was burned, the likely audience, and whether the accused had permission to enter the land.

In *Watts*, the accused threatened the President but this Court examined the context and concluded that it was not a "true threat." *Watts*, 394 U.S. at 708. This Court considered the location and timing of the speech, the audience's reaction, the speaker's tone and demeanor, the words used, and the location of the target. In *Watts*, the threat was not communicated to the target. The President was elsewhere and was highly unlikely to ever hear the potentially threatening speech, and consequently, highly unlikely to be placed in fear. Taking all this together, the Court found that the speaker's actions were not a true threat. *Id.* at 708. Thus, when evaluating a true threat, this Court has repeatedly emphasized the importance of fully considering all the circumstances, such as audience reaction and historical context, and warned against prejudging the evidence. *Id.*; *Black*, 383 U.S. at 367, 365.

An objective inquiry aligns with this precedent and accurately separates targeted speech that causes fear and disruption from protected speech. Fear of physical harm and the resulting societal disruption separate true threats from protected speech, not a speaker's state of mind. An objective inquiry is flexible and focuses on these actual, objective differences. An objective inquiry allows the fact finder to consider the speaker's intent as part of the totality of the evidence. But it does not require the fact finder to consider evidence about the defendant's state of mind to the exclusion of other evidence about context, history, and impact on the target. Accordingly, an objective inquiry views every case within its own context and clearly prohibits targeted speech that causes fear and disruption.

By contrast, a subjective inquiry would allow a subset of threatening speech – that which lacks proof of subjective intent – to avoid liability, despite instilling fear in a target and disrupting society. By not focusing solely on a speaker's state of mind, an objective inquiry identifies all disruptive speech, thereby better separating protected speech from true threats.

An objective inquiry is particularly appropriate in the context of new media communications. As noted, new media communications often lack non-verbal indicia of intent and are frequently drafted in private, leaving the target (and later the finder of fact) very little record beyond the written communication itself. There is no face-to-face interaction to discern tone, volume, facial expression, body language, or other traditional indicia of intent. Thus, individuals have the perfect opportunity to craft messages that engender fear in a specific target and force law enforcement to divert resources to prevent physical harm, but make it difficult to interpret a speaker's state of mind. Forcing a fact finder to determine a speaker's state of mind in this manner requires a great amount of speculation and inference, "blur[ring] the line" between true threats and free speech. *Black*, 538 U.S. at 365.

By creating an accurate test to distinguish protected speech from that which causes targeted fear and disruption, the objective standard does not criminalize speech that should rightly be protected. True threats are undeserving of First Amendment protections because of the significant tolls they take on the target and society at large. *Watts*, 394 U.S. at 707-08; *Black*, 538 U.S. at 359-60. When a reasonable

person targeted by a true threat becomes afraid for his or her physical safety and engages law enforcement for protection, the costs are the same regardless of whether the speaker's intent is provable in a court of law. Under the objective standard, the finder of fact must effectively determine whether a reasonable person in the defendant's position knew or should have known that his or her actions would engender fear in the target. This does not subject defendants to the whims of an "eggshell" victim or punish speech that a reasonable person could not foresee would instill fear. Rather, it proscribes only that speech that the speaker should have known would exact the interpersonal and societal tolls that the true threats exception was intended to address.

The objective standard clearly distinguishes between protected speech and true threats, taking into account the impact on the target and society at large. In so doing, it effectively fulfills the purpose of the true threat exception by deterring the targeted fear and societal disruption that true threats create.

CONCLUSION

For the foregoing reasons, and for those in Respondent's brief, the Third Circuit's judgment should be affirmed.

Respectfully submitted,

CHRISTOPHER WOLF*
KEITH O'DOHERTY
ARTHUR KIM
HOGAN LOVELLS US L.L.P.
555 Thirteenth Street, N.W.

Washington, D.C. 20004
(202) 637-8834
christopher.wolf@hoganlovells.com

*Counsel of Record
Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

Michael E. Rosman
Counsel of Record
Christopher J. Hajec
Center for Individual Rights
1233 20th St., NW, Suite 300
Washington, DC 20036
rosman@cir-usa.org
(202) 833-8400

Attorneys for Amicus Curiae

QUESTION PRESENTED

Under this Court's clear statement doctrine, grounded in important federalism concerns, should the term "threat" in 18 U.S.C. § 875(c) be interpreted narrowly, to require proof of a subjective intent to threaten?

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Rights is a public interest law firm based in Washington, D.C. It has a longstanding interest in issues of federalism. It litigated *United States v. Morrison*, 529 U.S. 598 (2000), and has participated in a number of other litigations, representing both *amici* and parties, concerning the proper scope of the federal government's reach under the Commerce Power and other enumerated powers. The Center for Individual Rights has an interest in this Court's interpreting 18 U.S.C. § 875(c) in this case to minimize that statute's intrusion into an area of traditional state concern. The Center also has an interest in the continued vitality of the clear statement doctrine, under which ambiguous terms in statutes are to be read to limit federal intrusion into areas of traditional state authority, as a safeguard of our nation's federal system of government.

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[1] This brief is filed with both parties' consent evidenced by their blanket consent letters filed with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This Court's interpretation of 18 U.S.C. § 875(c) on the question of whether that provision requires proof of a subjective intent to threaten, or is satisfied merely by proof of an objective intent, should be guided by important considerations of federalism.

Under the clear statement doctrine, a federal statute should not be read to expand federal incursion into an area of traditional state concern without a clear statement to that effect by Congress. Here, whether the text of § 875(c) requires proof of a subjective or merely an objective intent to threaten is ambiguous, and courts have differed on the question. Given this ambiguity, and the divergent understandings of the statute's text, the statute is anything but a clear statement by Congress. Yet to read the statute as authorizing convictions when no subjective intent to threaten has been proven would expand federal activity much further into the traditional state domain of defining and punishing crimes against persons than would reading the statute to require proof of a subjective intent to threaten.

The clear statement doctrine thus entails the narrower interpretation of the statute, in the interests of safeguarding the federal structure of our system of government.

ARGUMENT

I. UNDER THE CLEAR STATEMENT DOCTRINE, AN AMBIGUOUS FEDERAL STATUTE IS TO BE READ TO MINIMIZE FEDERAL INCURSION INTO AN AREA OF TRADITIONAL STATE CONCERN.

Section 875(c) makes it a federal crime for any person to "transmit in interstate or foreign commerce any communication containing .... any threat to injure the person of another...." The word "threat" is left undefined. Also, the jurisdictional sweep of this provision is very broad; for example, it is likely to be interpreted to ban "threats," however defined, in all, or virtually all, communications over the internet, even those between next-door neighbors. *See, e.g., United States v. MacEwan,* 445 F.3d 237, 245-46 (3d Cir. 2006) (holding that downloading images of child pornography from the internet was within the power of Congress to regulate under the Commerce Clause, regardless of whether the images were transmitted across state lines); *United States v. Kammersell,* 196 F.3d 1137, 1139 (10th Cir. 1999) (holding a bomb threat communicated through the internet from one person in Utah to another person in Utah sufficient to sustain federal jurisdiction under § 875(c) because the instant message sent by defendant was automatically routed to a Virginia server before being rerouted to the recipient's computer in Utah).

Yet such crimes as threats and assaults have traditionally been left to the states to define and punish. As this Court has explained, "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez.* 514 U.S. 549, 561 n.3 (1995) (inter-

nal citations and quotation marks omitted). Thus, "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Id.* (internal citations and quotation marks omitted).

To protect that "sensitive relation," *inter alia*, the clear statement doctrine has been developed by this Court. As this Court held in *United States v. Bass*, 404 U.S. 336, 349 (1971), "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." In particular, "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* On this basis, this Court in *Bass* interpreted an ambiguous federal statute prohibiting the possession of firearms by felons narrowly, requiring in each case proof of a connection with interstate commerce. *Id.* at 350.

In *Jones v. United States*, 529 U.S. 848, 858-59 (2000), this Court read another federal criminal statute narrowly for the same reason, interpreting an unclear federal arson statute as not applying to arsons of owner-occupied homes not actively used in interstate commerce because "arson is a paradigmatic common-law state crime" and the federal-state balance would be affected by a broader reading.

Drawing on these precedents, last Term this Court overturned a conviction under the Chemical Weapons Convention Implementation Act because of federalism concerns. *Bond v. United States*, 134 S. Ct. 2077 (2014). In that case, the petitioner had been

convicted under the Act because she had placed dangerous chemicals on objects likely to be touched by her best friend, who also happened to be her husband's paramour. *Id.* at 2085. This Court, finding insufficient indication that Congress intended the statute to reach such conduct, declined to extend it so far. Noting that "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute," and finding the statute's definition of "chemical weapon" not a clear statement of Congress's intent to criminalize simple assaults carried out with chemicals, this Court declined to interpret the statute so broadly as to cover such assaults. *Id.* at 2090-93. As this Court explained, "the most sweeping reading of the statute would fundamentally upset the Constitution's balance between national and local power," and it declined to conclude that Congress had intended such a result without a clearer statement that it had. *Id.* at 2093.

II. If The Word "Threat" In § 875(c) Does Not Clearly Include A Subjective Intent To Threaten, It Is, At Most, Ambiguous.

Petitioner convincingly shows in his brief that the normal understanding of the word "threat" actually *includes* a subjective intent to threaten. Petitioner's Br. 22-24. At *most,* then, Congress's failure to state explicitly that a subjective intent to threaten is an element of § 875(c), and its reliance on the unadorned word "threat," creates an ambiguity about what level of intent is required.

Before *Virginia v. Black*, 538 U.S. 343 (2003) (which bears on the level of intent required in § 875(c) under the First Amendment), was decided, courts interpreted "threat" under § 875(c) and in similar provisions divergently with respect to intent. Whichever view is right as a matter of statutory interpretation *irrespective* of federalism (or First Amendment) concerns, the very disagreement shows that Congress made anything but a clear statement.

Before *Black* was decided in 2003, some federal circuit courts, interpreting this bare word "threat," took the view that the intent that must be shown to prove a violation of § 875(c) was merely the intent to transmit a communication containing what a reasonable person would understand as a threat to injure the person of another. For example, the First Circuit adopted this interpretation in *United States v. Whiffen*, 121 F.3d 18 (1st Cir. 1997), mainly on policy grounds. The court held that this interpretation would preclude prosecutions of threats perceived only by unusually sensitive individuals, and also that it made it easier for the government to prosecute people successfully, explaining that "[t]his approach [] protects listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten" or the government cannot prove such intent. *Id.* at 21. *See also United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) (pronouncing the objective standard in summary fashion); *United States v. Darby*, 37 F.3d 1059, 1065-66 (4th Cir. 1994) (citing a Fourth Circuit presumption and accordingly presuming that the ob-

jective standard applied because the statute did not explicitly state that specific intent was required).

Other circuits (or, in the case of the Fourth, the same circuit in an earlier case) took a more stringent view, holding that the government must prove that a defendant had a subjective intent to threaten. *E.g., United States v. Twine,* 853 F.2d 676, 680-81 (9th Cir. 1988) (adopting the subjective standard because the importance of stopping threats against the president, which in an earlier case had supported adopting the objective standard for a statute criminalizing such threats, was lacking with respect to § 875(c), which criminalized threats generally); *United States v. Dutsch,* 357 F.2d 331, 333 (4th Cir. 1966) (stating in support of an admissibility holding that "a conviction under 18 U.S.C. § 875(c) requires a showing that a threat was intended")[2]; *United States* v. *Bozeman,* 495 F.2d 508, 510 (5th Cir. 1974) ("a conviction under 18 U.S.C. 875(c) requires proof that the threat was made knowingly and intentionally") (citing *Dutsch, supra).*

Other courts have interpreted the term "threat" in a comparable federal statute with similar divergency. *Compare, e.g., United States v. Metzdorf,* 252 F. 933, 934, 938 (D. Mont. 1918) (reading the term "threat" in 18 U.S.C. § 871, which as then phrased made it a crime to deposit in the mail material containing "any threat to take the life of or inflict bodily harm upon the President of the United States" narrowly, holding that "[a] threat is an avowed present

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[2] In *Darby, supra,* the Fourth Circuit disagreed with its earlier statement, dubiously characterizing it as a mere *dictum.*

determination or intent to injure presently or in the future. In threats to influence, existence of intent to execute is not essential; in the threats denounced by the [instant] part of the statute, it is otherwise")[3] *and United States v. Patillo,* 431 F.2d 293, 297-98 (4th Cir. 1970) ("[A] threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President.... There is no danger to the President's safety from one who utters a threat and has no intent to actually do what he threatens") *with U.S. v. Hoffman,* 806 F.2d 703, 707 (7th Cir. 1986) (adopting the objective test respondent urges here with respect to § 871 "[b]ecause sec. 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself") (internal quotation marks and citations omitted) *and United States v. Ogren,* 54 M.J. 481, 486 (C.A.A.F. 2001) (adopting the objective test for § 871 because "[t]he objective test more closely tracks Congress's intent in passing § 871 than the subjective test").

That federal courts have adopted such divergent views about what level of intent must be proven under both § 875(c) and a comparable provision amply shows that Congress here spoke ambiguously.[4]

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[3] It is worth noting that the difference between "threats to influence" and other threats on this point is relevant to any argument, based on *expressio unius,* that the subsections of § 875 that bracket § 875(c) explicitly require specific intent; in both, it is the intent to "influence." § 875(b), (d); *Metzdorf,* 252 F. at 937.

[4] Another consequence of this ambiguity may be that this Court should avoid the First Amendment issues petitioner raises en-

III. THE SUBJECTIVE READING OF § 875(C) MINIMIZES THE INCURSION OF THAT STATUTE INTO AN AREA OF TRADITIONAL STATE CONCERN.

Threats that meet the objective test (whether or not they also are subjectively intended) are a wider circle of threats than those that meet the subjective test. For many threats that meet the objective test might not meet the subjective test, whereas all or almost all that meet the latter meet the former.

Here, for example, petitioner's Facebook posts might be regarded as threatening by a reasonable person, but it is a further, and by no means clear, question whether he subjectively intended them as threats. *See also Ogren*, 54 M.J. at 482-83, 488 (noting that whereas an incarcerated Naval seaman recruit's graphically descriptive statements that he would kill the president would be perceived as threatening by a reasonable person, it was a further question whether he only intended to "blow off steam" and express displeasure at his incarceration).

By contrast, it is hard to imagine a threat that meets the subjective test but not the objective one. A defendant's subjective intent to threaten by given words or actions would not be enough to communi-

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[Footnote continued from previous page]

tirely, by interpreting the statute in his favor. *See, e.g., Jones*, 529 U.S. at 857 ("'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter'") (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

cate a threat, unless a reasonable person would perceive the words or actions as threatening, except in any rare instances where an unreasonable interpretation by an observer happened to align with a real but ineptly-communicated menace from the defendant.

Also, the subjective standard is harder to meet than the objective one, *see, e.g., Whiffen*, 121 F.3d at 21, and thus requiring proof of subjective intent will limit federal prosecutions in this area of traditional state concern, minimizing disruption of the traditional federal-state balance.

CONCLUSION

Because Congress has made no clear statement in § 875(c) about what level of intent to threaten must be proven, but left the standard ambiguous, this Court should adopt the narrower, less-intrusive subjective test on federalist grounds. Accordingly, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

Michael E. Rosman
Counsel of Record
Christopher J. Hajec
Center for Individual Rights
1233 20th St. NW, Suite 300
Washington, DC 20036
rosman@cir-usa.org
(202) 833-8400

Attorneys for Amicus Curiae

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AMICUS CURIAE BRIEF

No. 13-983

IN THE

Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U. S. C. § 875(c) requires proof of the defendant's subjective intent to threaten.

2. Whether, by virtue of the First Amendment, proof of a defendant's subjective intent to threaten is required for conviction under § 875(c).

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Secondary Authorities

American Law Institute, Model Penal Code and Commentaries (1985) 7, 8, 12

Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932 (1919) 13

LaFave, W. , Substantive Criminal Law (2d ed. 2003) 6, 8, 10

Rothman, Freedom of Speech and True Threats, 25 Harv. J. L. & Pub. Policy 283 (2001) 9

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IN THE

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ANTHONY DOUGLAS ELONIS,

Petitioner,

vs.

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Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid,

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1. Both parties have filed blanket consents to the filing of *amicus* briefs.

   This brief was authored entirely by counsel for *amicus*, as listed on the cover, and by law student Joshua H. Crawford of Suffolk University Law School, and not by counsel for either party in whole or in part. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

efficient, and reliable determination of guilt and swift execution of punishment.

The defendant/petitioner in this case proposes a rule of law by which a person who has made a statement that any reasonable person would consider to be a threat of murder and which does in fact strike terror into the heart of the victim would be able to escape criminal punishment merely by claiming he was "just kidding" if the contrary could not be proved beyond a reasonable doubt. In addition to claiming that the statute in question should be construed this way, he further claims that any statute not allowing such a defense is unconstitutional. Such unwarranted and unnecessary overprotection of threats would be contrary to the interests of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Anthony Elonis was charged with "transmitting in interstate commerce communications containing a threat to injure the person of another" under 18 U. S. C. § 875(c). *United States* v. *Elonis*, 730 F. 3d 321, 326 (CA3 2013).

The charges and convictions stem from a series of posts on the social media website Facebook shortly after Elonis's wife left him, taking their two young children with her. *Id.*, at 324. Soon after his wife left, Elonis was seen weeping at his desk and began to act out at work. In October of that year, after posting a photograph showing Elonis in a Halloween costume holding a knife to a coworker's neck with the caption "I wish" under the photograph, Elonis was fired. *Ibid.* At this point Elonis's behavior deteriorated further. Over the next 2 months Elonis would make a number of Facebook posts in which he would reference killing police,

the local sheriff's department, school children, an FBI agent, and, often in great detail, his estranged wife. As an example of one of the posts, on November 15, 2010, Elonis posted on his Facebook page:

> "Fold up your PFA [protection from abuse order] and put it in your pocket. Is it thick enough to stop a bullet?
>
> "Try to enforce an Order
>
> "That was improperly granted in the first place. Me thinks the judge needs an education on true threat jurisprudence
>
> . . .
>
> "And if worse comes to worse
>
> "I've got enough explosives to take care of the state police and the sheriff's department
>
> "[link: Freedom of Speech, www.wikipedia.org]" *Id.*, at 325-326.

Elonis's wife was not a Facebook "friend" and therefore not automatically notified of his posts about her. See Brief for Petitioner 5-6, 12. However, family members and mutual friends remained Facebook "friends" with him and brought the apparent threats to her attention. See J. A. 151. She testified, "I felt like I was being stalked. I felt extremely afraid for mine and my childrens' and my families' lives." J. A. 153.

Elonis asked for a jury instruction saying that a statement "cannot constitute a 'true threat' under the statute unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation," J. A. 20, citing *United States* v. *Alkhabaz*, 104 F. 3d 1492, 1495 (CA6 1997) and *United States* v. *Bagdasarian*, 652 F. 3d 1113 (CA9 2011). The prosecution requested instruction on the objective "reasonable person" standard. J. A. 25. As the latter standard was

established in binding Third Circuit precedent, *United States* v. *Kosma*, 951 F. 2d 549, 556 (CA3 1991), the District Court gave the objective instruction. See J. A. 30, 301. Elonis was convicted, and the Third Circuit affirmed. See *Elonis*, 730 F. 3d, at 335.

SUMMARY OF ARGUMENT

The petitioner and supporting *amici* simply assume that the objective standard used in this case constitutes a "negligence" mental element with no analysis and no authority other than conclusory statements in a couple of concurring opinions. It is not. The mental state element for this crime is a "knowledge" standard—knowledge of the basic fact of the content of the statement. The further characterization of the statement as a true threat under an objective standard is indistinguishable from other cases where this Court has held that only knowledge of the basic fact was required.

An alternative to the objective standard is worth mentioning, though not CJLF's preferred position. If the Court adopts the Model Penal Code position that mental state is always the defendant's actual mental state and never involves "reasonable person" tests, it should also adopt the Model Penal Code rule that when a statute is silent on the mental element either purpose, knowledge, or reckless disregard will suffice. Under that standard, it would be sufficient that the maker of a statement acted with reckless disregard of whether it would be taken as a threat.

The standard used in this case presents no serious constitutional doubt. In *Chaplinsky* v. *New Hampshire* and *Hamling* v. *United States*, this Court upheld against First Amendment challenge statutes that required only that the defendant knew the content of the expression and left the characterization "fighting

words" or "obscenity," respectively, to reasonable person or community standards. Statements in *Virginia* v. *Black* which are at most ambiguous should not be construed to work a major change in the law in a case where the issue was not presented.

On basic principles of statutory construction, 18 U. S. C. § 875(c) contains no mental element of "subjective intent," "specific intent," or "purpose," which are largely the same thing here. By creating a lesser included offense without the specific intent requirement of the prior, greater offense, Congress implicitly created a general intent offense.

The victims of threats, not the makers of threats, are the ones who need "breathing space." In today's "anything goes" society, violent speech in what passes for art flourishes uninhibited by the federal threat statute and its long-standing interpretation as having a "reasonable person" standard. As the two cases in *Virginia* v. *Black* illustrate, it is only threats targeted at identifiable victims, not violent or hateful speech painting with a broad brush, that are subject to prosecution. Persons who want to make social or political commentary can easily stay far away from the unprotected zone without any diminution of their ability to make their point. Victims, on the other hand, need protection from threats that are veiled or that skate on the edge of what is allowed. Such almost-threats contribute nothing of value to the marketplace of ideas and do not deserve any "breathing space."

ARGUMENT

I. The mental state choice in this case is between knowledge and purpose, not between subjective intent and negligence.

The petitioner's central argument, in a nutshell, is that the mental state for a crime of pure speech cannot be mere negligence, and therefore a person who makes statements that are clearly threats of violence on their face must be allowed a "just kidding" defense.

The premise may very well be true, but the conclusion does not follow. The choices are not limited to subjective intent (or purpose or specific intent) and negligence.[2] Between these two endpoints are the middle grounds of knowledge and reckless disregard. They are clearly constitutional, and knowledge would fit better what has, until fairly recently, been the nearly universal interpretation of the statute in question.

A. Knowledge and Purpose.

In the traditional taxonomy of mental state, crimes were designated either "specific intent" or "general intent." See *United States* v. *Bailey*, 444 U. S. 394, 403 (1980). Burglary, for example, required breaking and entering with the specific intent to commit larceny or a felony inside, see 3 W. LaFave, Substantive Criminal Law § 21.1(e) (2d ed. 2003), while the same wrongful act with only a general intent to commit the act would be a lesser offense. See *id.*, § 21.2 (criminal trespass). The objective standard for determining what is a threat for the purpose of the statute in the present case, 18 U. S. C. § 875(c), has been described as a "general

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2. Cf. Brief for Petitioner 20 ("Without a subjective intent requirement, Section 875(c) would impose criminal punishment for negligent speech in violation of the First Amendment.")

intent" requirement, distinguished from the subjective intent to threaten, which would be a "specific intent" requirement. See *United States* v. *Jeffries*, 692 F. 3d 473, 478 (CA6 2012) (quoting *United States* v. *DeAndino*, 958 F. 2d 146, 149 (CA6 1992)).

This classification scheme has long been criticized, and the trend has been toward adoption of a different hierarchy of mental states, generally along the lines suggested in the American Law Institute's Model Penal Code.[3] See *Bailey*, 444 U. S., at 403-404; see also *Dixon* v. *United States*, 548 U. S. 1, 7 (2006) ("a more specifically defined hierarchy of culpable mental states," citing *Bailey*). "The different levels in this hierarchy are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *Bailey*, *supra*, at 404.

The legislative authority, if it chooses to, can include a requirement of purpose or specific intent. A different subsection of the statute at issue in this case does indeed include such a requirement. In 18 U. S. C. § 875, subdivision (b) defines a higher degree of the offense, distinguished from the lesser degree in subdivision (c) by the additional requirement of an "intent to extort." The higher degree is punishable by a maximum of twenty years instead of five. *Virginia* v. *Black*, 538 U. S. 343 (2003), involved a statute in which the Virginia legislature chose to outlaw burning a cross with "an intent to intimidate." *Id.*, at 347 (plurality opinion). These statutes require that the person making the provocative statement (verbal or symbolic) do so with a particular purpose in mind. In the terms of MPC § 2.02(2)(a)(i), "it is his conscious object to engage in conduct of that nature or to cause such a result."

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3. See American Law Institute, Model Penal Code and Commentaries § 2.02 (1985) ("MPC").

However, legislatures do not always or even usually require this most culpable mental state, and there is often good reason not to. See 1 W. LaFave § 5.2(b), at 342. Proving what is inside the defendant's head beyond a reasonable doubt can be a difficult and sometimes impossible task, see *Giles* v. *California*, 554 U. S. 353, 387 (2008) (Breyer, J., dissenting), and a person who does a wrongful act knowing what he is doing often should be held responsible for it, whether he had a wrongful purpose or not. In the MPC taxonomy, this next level down is "knowingly," defined as "he is aware that his conduct is of [the proscribed] nature or that such circumstances exist." MPC § 2.02(2)(b)(i).[4]

We should note at this point that although the Model Penal Code's hierarchy of mental states is widely, if not universally, regarded as superior to the old specific versus general intent terminology, the MPC's details of the definitions of these states do not enjoy the same degree of acceptance. Courts have found the "knowledge" mental element satisfied in situations outside the MPC definition, including "reasonable person" standards. See 1 LaFave § 5.2(b), at 347. Thus while the American Law Institute rejects "reasonable person" standards for the mental states of purpose and knowledge, see MPC § 2.02, Comment, at 234, that does not settle the matter.

Petitioner offers surprisingly little support for his assertion that the objective standard amounts to a mental state of negligence. He merely cites a couple of concurring opinions, see Brief for Petitioner 3-4, and those opinions offer little more than bare assertions. See *Rogers* v. *United States*, 422 U. S. 35, 47 (1975) (Marshall, J., concurring); *United States* v. *Jeffries*, 692

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4. Paragraph (ii) deals with elements relating to the results of conduct, not relevant here.

F. 3d 473, 484 (CA6 2012) (Sutton, J., concurring dubitante). The student law review note often cited in this area similarly just cites the *Rogers* concurrence and nothing more. See Rothman, Freedom of Speech and True Threats, 25 Harv. J. L. & Pub. Policy 283, 316 (2001).

This Court has inferred a mental state element in criminal statutes where Congress has neither included one nor disclaimed any, see Brief for Petitioner 28, but the inferred mental state is typically knowledge, not purpose or specific intent. The classic case of *Morissette* v. *United States*, 342 U. S. 246, 270-271 (1952), held that "knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." Petitioner also relies on *United States* v. *X-Citement Video*, 513 U. S. 64 (1994), but that case also inferred a factual knowledge element, not a subjective purpose. The statute required only that the proprietor of X-Citement Video knew that the notorious Traci Lords was underage, and that was all it needed to eliminate any constitutional doubts. See *id.*, at 66-67, 78.

The only case petitioner cites that deviates from the pattern of purely factual knowledge is *Liparota* v. *United States*, 471 U. S. 419 (1985). A conclusion that the defendant in a food stamp fraud case had to know his conduct was illegal resulted from the unusual nature of that statute, so that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.*, at 426.

The closest analogy to the present case can be found in the pornography cases. In *Hamling* v. *United States*, 418 U. S. 87, 119-120 (1974), the statute on mailing obscene materials had a "knowingly" requirement, and

the defendants contended that the government must prove both their knowledge of the contents and their knowledge that it qualified as obscene. The Court rejected the argument, requiring only knowledge of the objective fact of the contents. " 'The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated.' " *Id.*, at 120-121 (quoting *Rosen* v. *United States*, 161 U. S. 29, 41-42 (1896)).

The present case is a close fit to *Hamling*. The defendant knew the basic fact of what he wrote, and he knew he published his statements on a medium that reaches not only interstate but worldwide. This is sufficient to make this a "knowing" mental state requirement.

Negligence, on the other hand, is a poor fit to the mental state at issue here. The essence of negligence is taking unreasonable risks. See 1 LaFave § 5.4(a)(1), at 367. There was no risk in what the defendant said or how he published it. These are certainties. There would be a risk factor if the status of the statements as threats depended on how the actual target actually perceived them, and petitioner tries to make that argument, see Brief for Petitioner 3-4, but actual target reaction is not an element of this crime. The only risk is how the trier of fact will judge the defendant's actions. But that is the same risk as in *Hamling*. It does not transform the mental state element from knowing to negligent.

There are many areas of law where an element involves a judgment by the jury made after the fact. Murder, for example, is generally defined with an element that the killing be unlawful. See 2 LaFave § 14.1, at 416. Whether the killing was unlawful may

involve a judgment about the legality of the use of deadly force, such as whether it was justified in self-defense or performance of duty. The risk that the jury may see this differently than the defendant does not transform murder into a crime of negligence rather than intent.

The District Court's use of the word "foresee" in the jury instruction does not convert the required mental state from knowing to negligent. In context, this word does not refer to prediction of any future event or assessment of a risk of any event occurring in the future. It is merely an awkward way of phrasing the objective "reasonable person" test. This case is presently before this Court to resolve a circuit split on subjective versus objective mental state, see Pet. for Cert. 16, but there is also a "circuit crack" in the various formulations of the objective test. *United States* v. *White*, 670 F. 3d 498, 510 (CA4 2012) collects the cases. The Eleventh Circuit's formulation, referring to neither speakers nor listeners nor foreseeing, is best. "[T]he inquiry is whether there was sufficient evidence to prove beyond a reasonable doubt that the defendant intentionally made the statement under such circumstances that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm." *United States* v. *Alaboud*, 347 F. 3d 1293, 1296-1297 (CA11 2003) (citation and internal quotation marks omitted).

Under the objective test applied in the present case, the mental state element is one of *knowingly* making a threat. The subjective standard the defendant seeks would be one of *purposely* making a threat. That is the choice before the Court. *Negligence* is not at issue here.

B. The Reckless Disregard Alternative.

There is another alternative worth mentioning here. As noted, *supra*, at 8, the Model Penal Code rejects "reasonable person" standards for the mental state of knowledge and requires actual knowledge. However, the MPC also rejects the suggestion of petitioner that courts should read the highest degree of mental culpability, purpose, into a statute that has no mental element stated in the text. Instead, the MPC's rule of interpretation is that where no mental state is specified, purpose, knowledge, *or* recklessness will suffice. See MPC § 2.02(3) and Comment, at 244.

If both of these positions are accepted, then juries would be instructed to find the mental element satisfied if the defendant had the purpose to make a threat *or* he knew the statement would be perceived as a threat *or* he acted with reckless disregard of whether the statement would be perceived as a threat.

The defamation cases establish that a mental state of reckless disregard is sufficient to satisfy the First Amendment. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964) ("same standard" for criminal cases).

II. The mental element of knowledge and the objective test present no serious constitutional doubt.

When a case presents both nonconstitutional and constitutional questions, principles of judicial restraint generally require the court to resolve the nonconstitutional question first and then express no opinion on the constitutional question if it is not necessary to decide the case. See, *e.g.*, *Slack* v. *McDaniel*, 529 U. S. 473, 484-485 (2000). This nor-

mally straightforward maxim becomes a bit more complicated when the doctrine of constitutional doubt is invoked in a statutory interpretation argument. If the statutory interpretation question is otherwise close, a look at the constitutional question is necessary. See, *e.g.*, *Jones v. United States*, 526 U. S. 227, 239-240 (1999).

After setting up the straw man of a negligence mental element in a prohibition of pure speech, the petitioner and supporting *amici* present the Court with various arguments to knock it down. The real question is whether there is genuine doubt of the constitutionality of a statute with a mental element of the defendant's knowing what he said coupled with an objective standard for characterizing the statement as unprotected speech. The answer is no. This Court squarely resolved that question long ago, and it has recently reiterated that subjective purpose is not required in a First Amendment "pure speech" case.

The proposition that knowledge and not purpose is sufficient to exclude a statement from the protection of the First Amendment can be seen in the classic hypotheticals of obviously unprotected statements. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). Would it matter what his purpose was in falsely shouting fire? Would the speech be protected if he had some purpose other than causing a panic? Of course not. It does matter, obviously, that he had knowledge of the basic fact that there was no fire, but purpose is irrelevant.

Similarly, publishing the sailing dates of troop transports was so obviously unprotected speech shortly after World War I as to require no discussion. See Chafee, Freedom of Speech in War Time, 32

Harv. L. Rev. 932, 939 (1919). Would it matter if the newspaper publisher had the innocent purpose of enabling the soldiers' families to see them off, rather than the nefarious purpose of assisting German U-boats to sink the ships? Of course not. Subjective purpose would matter if the publisher were charged with treason for aiding the enemy, cf. *Haupt* v. *United States*, 330 U. S. 631, 641 (1947), but it does not matter for the purpose of determining whether the publication is constitutionally protected from any government restraint.

The classic "fighting words" case, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), provides a close parallel to the present case. This Court's brief opinion found that Chaplinsky's words were unprotected "fighting words" likely to cause a breach of the peace. *Id.*, at 574. The Court also rejected a claim that the statute was too vague, *ibid.*, referring to the state court opinion for the meaning of the statute. See *id.*, at 572-573.

Turning to the New Hampshire Supreme Court's opinion, we find a more complete discussion. Chaplinsky made an argument very similar to the one made in this case. The passage quoted in part by this Court, *id.*, at 573, reads in full:

> "The defendant further says that our statute is invalid because it is so vague and indefinite that one coming within its purview may not know what is prohibited. In this connection, the claim is made that the test of what is offensive is purely subjective in the sense that it is to be determined by the way the addressee reacts to it. The defendant therefore argues that nobody can know what is offensive language, since one man may be offended by words to which another man would take no exception. We have never construed the statute by any such test.

> The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The legislature had no such vague, shifting test in mind. As was long ago said, they had in mind the tendency of words, not their actual result. The analogy was that of the distinction between civil and criminal libel. *State* v. *Brown*, 68 N. H. 200.
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> "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." *State* v. *Chaplinsky*, 91 N. H. 310, 320, 18 A. 2d 754, 762 (1941).[5]

In affirming this decision on the vagueness challenge, quoting the "men of common intelligence" standard, this Court rejected the idea that an objective, "reasonable person" standard for determining whether speech is protected gives insufficient protection to speech or insufficient notice to speakers. Cf. Brief for Petitioner 46-47.

That rejection was strongly reinforced in *Hamling* v. *United States*, 418 U. S. 87 (1987). That case involved a statute which forbade mailing obscene materials and declared that "[w]hoever knowingly uses the mails for the mailing" of such material was guilty of a crime. See *id.*, at 98, n. 8. The "principal question" of the case was whether obscenity should be judged by the standard in effect at the time of the offense and trial, *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), or the standard announced while the case was on appeal, *Miller* v. *California*, 413 U. S. 15 (1973). See 418 U. S., at 98. In addition, though, the defendants made a

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5. The state court also recognized that although the expression "damned Fascist" was "fighting words" in 1941, it might not always be. See *id.*, at 321, 18 A. 2d, at 762. The era in which the statement was made was a relevant circumstance in determining whether it was "fighting words."

scienter argument not materially different from the one in this case.

The District Court instructed the jury that guilt required that the defendants knew the character of the materials and knew they were mailed but that their belief as to whether the materials qualified as "obscene" was irrelevant. *Hamling*, 418 U. S., at 119-120. The defendants argued for a subjective test, that their own awareness that the materials were obscene was required. See *id.*, at 120. The Court had rejected that argument in the previous century, *Rosen* v. *United States*, 161 U. S. 29, 41-42 (1896), and it rejected it again in *Hamling*, at 123-124:

> "We think the 'knowingly' language of 18 U. S. C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U. S. C. § 1461 nor by the Constitution."

If the Constitution does not require even subjective awareness that the speech falls into an unprotected category, it surely cannot require a subjective purpose to make an unprotected statement. In *Hamling*, the character of the materials was easily sufficient to put the defendants on notice that they were quite likely to be regarded as obscene. See 418 U. S., at 92-93 (describing materials). In the present case, no rational

person could doubt that the defendant's statements might be regarded as threatening. Indeed, the defendant himself expressed an awareness that his statements raised an issue under "true threat jurisprudence." See *Elonis*, 730 F. 3d, at 325.

> Under the *Miller* test, obscenity is determined by
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> "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Hamling*, 418 U. S., at 102 (quoting *Miller*, 413 U. S., at 24).

This test provides no greater ability to determine precisely in advance what speech is unprotected than the objective test for threats provides. Indeed, it is considerably more difficult to apply. The prior law was even less definite, causing one Justice to famously declare regarding hard-core pornography, "perhaps I could never succeed in intelligibly [defining it]. But I know it when I see it . . . ." *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964) (Stewart, J., concurring). Any claim that the reasonable person standard at issue in this case is unconstitutional because a person might misjudge which side of the line a borderline threat falls on is unsupportable in light of *Hamling*.

Finally, it is worth noting that only four years ago this Court rejected an argument that it should read a specific intent requirement into a statute to avoid constitutional doubts. See *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 16-17 (2010). The Court held that the statute plainly required only "knowledge about

the organization's connection to terrorism," *ibid.*, and it upheld the statute as constitutional, at least as applied to the speech at issue in the case. See *id.*, at 39.

A common thread in all these hypotheticals and cases is that the defendant's inner purpose in speaking has nothing to do with the reason the speech is unprotected. The harms of a panic in a theater, sinking a troop transport, starting a brawl, debasing our society, or strengthening a terrorist organization are the same regardless of *why* the speaker did it. Some mental state element is required to avoid punishing innocent persons, such as the bookstore owner who does not know what is in an allegedly obscene book on his shelf, see *Smith* v. *California*, 361 U. S. 147, 152-153 (1959), but the most culpable and most difficult to prove mental state, subjective purpose, is far beyond what is required.

Virginia v. *Black*, 538 U. S. 343 (2003), did not make the change petitioner ascribes to it. The plurality opinion noted, "Intimidation in the constitutionally proscribable sense of the word is *a type* of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.*, at 360 (emphasis added). The statement "a collie is a type of dog" does not imply that Labrador retrievers are not dogs. Quite the contrary, "a type" strongly implies that there are other types. Similarly, the word "encompass" in the same paragraph, *id.*, at 359, means that the kinds of threats at issue in the case are included but does not imply that other kinds are excluded.

The reasons given why threats are not protected also strongly imply that other kinds of threats are also included in "true threats." "[A] prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that

the threatened violence will occur.' " *Id.*, at 360 (quoting *R. A. V.* v. *City of St. Paul*, 505 U. S. 377, 388 (1992)). The subjective intent of the speaker is completely irrelevant to two of the three reasons. A statement that most people would regard as a threat and that the target does take as a threat causes just as much fear and disruption regardless of the speaker's purpose.

Even if there were enough ambiguity in the *Black* opinion to make a plausible argument that it means what petitioner claims, it should not be given that interpretation. Given the nearly uniform interpretation of the federal threat statute to the contrary, this would be a major change in the law. To make such a change in a case that does not present the issue would be "contrary to the fundamental principle of judicial restraint that courts should . . . [not] formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008) (citations and internal quotation marks omitted). While that principle is not invariably observed, to be sure, its violation should not be lightly attributed.

When the statute is properly understood and the "negligence" straw man is put away in the barn where he belongs, there is no substantial doubt as to the constitutionality of this statute as construed by most of the courts of appeals. *Hamling* makes unmistakably clear that knowledge of the character of the speech is sufficient scienter for the First Amendment, and the legal characterization of that speech as inside the boundary of an unprotected category is not something the defendant needs to subjectively know. *Chaplinsky* makes clear that the test for unprotected speech may be how a reasonable person would judge the statement.

The question therefore reduces to one of straightforward statutory interpretation, unhindered by the constitutional doubt doctrine.

III. Under standard principles of statutory interpretation, 18 U. S. C. § 875(c) contains no specific intent, subjective intent, or purpose element.

The issue of the intent required by 18 U. S. C. § 875(c) is often phrased in terms of whether Congress intended that this be a specific or general intent crime. See *United States* v. *Teague*, 443 F. 3d 1310, 1319 (CA10 2006) (collecting cases). In those terms, the Ninth Circuit found that 18 U. S. C. § 875(c) requires a specific intent and therefore a subjective mental state in *United States* v. *Twine*, 853 F. 2d 676, 680 (CA9 1988). The other circuits held it is a general intent crime. See *Teague*, *supra*, at 1319.

More recently, the terminology has shifted. The debate now is in terms of subjective intent. *United States* v. *Cassel*, 408 F. 3d 622, 633 (CA9 2005), involving a different federal statute, concluded that *Virginia* v. *Black*, 538 U. S. 343 (2003), created a constitutional requirement of "proof that the speaker subjectively intended the speech as a threat." The other circuits have not agreed that *Black* made this change. See *Elonis*, 730 F. 3d, at 330-332. They are correct. See *supra*, at 18; Brief for the United States 41-42. In this context, there is no real difference between "subjective intent," "specific intent," and "purpose."

No such refined mental element can be squared with the language of 18 U. S. C. § 875. Subsection (c) reads: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of an-

other, shall be fined under this title or imprisoned not more than five years, or both." Absent from subsection (c) is any mention of a specific intent requirement. However, this is not the case with the rest of 18 U. S. C. § 875. Both sections (b) and (d) of 18 U. S. C. § 875 have a requirement that a person accompany a threat "with intent to extort from any person, firm, association, or corporation, any money or other thing of value . . ." in order to constitute a violation. This Court has repeatedly stated, "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 508 U. S. 200, 208 (1993) (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983)).

To make this point even more clear, it is helpful to overlay the language of subdivisions (b) and (c), with the common language in roman type, the added words of (b) in italics, and the added word of (c) in strikeout:

> "Whoever, *with intent to extort from any person, firm, association, or corporation, any money or other thing of value,* transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than *twenty* ~~five~~ years, or both."

The only difference in the definition of the offense is the specific intent element present in (b) and absent from (c). Other than that, the offense definitions are identical. The other difference is the maximum penalty. Subdivision (c) is a lesser included offense of subdivision (b). Of course it is true that when Congress omits any mention of a mental state it generally does not intend that there be no mental element, but it is a

much greater stretch to argue that Congress intended that a statute have a specific intent or purpose element without specifying what it is.

The distinction between subsection (c) and the other subsections of 18 U. S. C. § 875 is made clear by its history. Section 875 is the result of a law passed in 1932 which crimalized the use of mail to transmit a threat to injure or kidnap any person or to accuse a person of a crime or demand ransom for a person. Pub. L. No. 72-274, 47 Stat. 649 (1932). However, to fall within the scope of the act the communication had to be sent "with intent to extort from any person any money or other thing of value." *Ibid.* The act was later amended by Pub. L. No. 73-231, 48 Stat. 781 (1934) to apply to threats transmitted "by any means whatsoever," but still required the specific intent of extortion.

The act was again amended in 1939, this time expanded to apply to threats to kidnap or injure that were not made with the specific intent to extort. Pub. L. No. 76-76, 53 Stat. 742, 744 (1939). This new subdivision was added because of the Justice Department's inability to address "a number of threats of a very serious and socially harmful character not covered by the existing law" S. Rep. No. 349, 76th Cong., 1st Sess. 4 (May 1, 1939). The "serious and socially harmful character" of the threats demonstrates a concern, not with the subjective intent of the sender, but with the effect that the threat has on the listener and society. Thus, the lesser offense is one of making a threat "not accompanied by an intent to extort," *ibid.*, without specifying any alternative specific intent.

"*Morissette*, reinforced by *Staples*,[6] instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States* v. *X-Citement Video*, 513 U. S. 64, 72 (1994). This presumption should extend no further than its purpose requires, particularly since it involves courts writing words into statutes that the legislature did not put there. In the older terminology, it requires inferring only a general intent requirement, not a specific intent. In Model Penal Code terms, it requires an inference that any of the mental states of purpose, knowledge, or recklessness is sufficient. See *supra*, at 12. In this case, as in *Hamling*, it requires only that the defendant knew the contents of the statement and that most people would regard the statement as a threat. Skating on the edge of threats is not innocent conduct. Innocent people stay well away from threats when they speak.

IV. The victims of threats, not the makers of threats, are the ones who need "breathing space."

Arguments for a broad interpretation of the First Amendment—and a restrictive view of the ability of government to protect innocent people—regularly invoke the notion that freedom of speech requires "breathing space." See, *e.g.*, *Snyder* v. *Phelps*, 562 U. S. __, 131 S. Ct. 1207, 1219, 179 L. Ed. 2d 172, 185 (2011). In some contexts, that may be true. The boundary between protected and unprotected speech will often be fuzzy. The value of speech in the twilight zone near

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6. *Staples* v. *United States*, 511 U. S. 600, 622, n. 3 (1994) (knowledge that a gun is an automatic, not that the law requires it to be registered).

that boundary may be such that the risk of protecting speech that is actually proscribable is greater than the risk of inhibiting speech that is actually protected.

The "breathing space" argument is particularly weak as applied to threats. "From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R. A. V.* v. *City of St. Paul*, 505 U. S. 377, 382-383 (1992) (quoting *Chaplinsky*, 315 U. S., at 572).

In assessing whether any speech of "social value as a step to truth" may be inhibited by a restriction on threats, it is important to keep in mind the distinction between the two cases joined in *Virginia* v. *Black*. The provision that burning of a cross alone was prima facie evidence of an intent to intimidate (and thus *a* type of true threat) was invalid because it did not distinguish the two types of cases:

> "It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission." 538 U. S., at 366.

The two cases before the court were a cross burning at a rally to make a broad public statement and a cross burning on a neighbor's lawn intimidating one targeted family. *Id.*, at 348-350. Those cases are different, and they need to be distinguished. With this distinction in mind, an *amicus* brief submitted in support of the petitioner actually illustrates why speech of (barely) arguable value is in no danger.

"Gangsta rap" is a subgenre of rap that is typically violent, often misogynist, and sometimes racist. The *amicus* brief claims we should find social value in gangsta rap. See generally Brief of Marion B. Brechner First Amendment Project *et al.* as *Amici Curiae* ("Brechner Brief"). The premise is doubtful. Most persons of sense would likely agree that the world would be a better place if this subgenre vanished from its face tomorrow. But that is not going to happen, which is why their argument is invalid. Even if we swallow hard and accept the premise strictly for the sake of argument, the conclusion that a subjective standard of intent is necessary to prevent chilling this speech does not follow.

In Part III of their brief, the *amici* note various "attacks" on rap. Most of these "attacks" are people exercising their own freedom of speech. An assistant director of the FBI sent a letter. Brechner Brief 17-18. The wife of a Senator (and future Vice President) wrote an op-ed. *Id.*, at 18-19. The President and Vice President made public statements. *Id.*, at 19. Police organized a boycott to pressure companies not to sell the records. See *ibid.* Civil rights activists also denounced the genre. *Ibid.* A journalist made an argument in a debate series. *Ibid.* And what exactly is wrong with any of that? Hasn't this Court said repeatedly that the remedy for bad speech is more speech? See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 498 (1996).

The only claims of any action through government power are a vague allegation that police somehow disrupted performances and an assertion that some artists were arrested on lewdness charges. See Brechner Brief at 18. Conspicuously absent is any claim that at any time any artist was arrested or charged under a threat statute, despite the nation supposedly being in a "moral panic." If none of the numerous and powerful people engaged in this "panic" ever thought to use a threat statute against rap, then the threat statutes must not have been much of a threat, even though the objective standard was the prevailing if not universal interpretation of the federal threat statute at the time.

This brings us back to the distinction in *Black*. Violent, hateful, despicable statements made in broad terms that cannot reasonably be construed as actual threats to specific targets are not "true threats" as that term is understood in *Black*, and that is true regardless of the speaker's subjective intent. Barry Black can spew his hate at his Klan rally, and the gangsta rappers can spew their hate as well, all under the ample protection of the First Amendment. Avoiding the kind of targeted threat that falls in or anywhere near the unprotected territory of "true threats" is easily done and does not significantly chill the ability of the haters to spread their message.

Statements that can reasonably be understood as actual threats to harm identified targets have little or no place in the marketplace of ideas. In *Chaplinsky*'s words, they have "slight (or no) social value as a step to truth." A person who wants to make a statement on any social or political issue or any other topic of public discussion can quite easily avoid making such threats without any reduction in his ability to get his point across.

The victims of threats are the ones who need the breathing space.[7] Threat-makers can strike terror into people's hearts by making veiled threats or by trying to skate on the edge of what is allowed, as Elonis attempted in this case. Given the utter lack of any legitimate reason for doing so, a little bit of chilling near the border does no harm and may do considerable good.

In today's "anything goes" world, violent expression needs no more breathing space than it already has. America does not need a "just kidding" defense for those who threaten to kill people.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be affirmed.

October, 2014

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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7. We understand the psychological impact of threats on victims will be presented in other briefs and so do not repeat that argument here.

AMICUS CURIAE BRIEF

No. 13-983

IN THE

Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AND PROFESSOR MARGARET DREW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JOAN S. MEIER
DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 G Street, N.W.
Washington, D.C. 200052
(202) 994-2278

DAVID B. SALMONS
Counsel of Record
JONATHAN M. ALBANO
STEPHANIE SCHUSTER
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373–6000
david.salmons@bingham.com

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Brandenburg v. *Ohio*,
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Gertz v. *Robert Welch, Inc.*,
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Ginsberg v. *New York*,
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NAACP v. *Claiborne Hardware Co.*,
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Phila. Newspapers, Inc. v. *Hepps*,
475 U.S. 767 (1986).....10

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Rosen v. *United States*,
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Smith v. *California*,
361 U.S. 147 (1959).....8

Snyder v. *Phelps*,
__ U.S. __, 131 S. Ct. 1207 (2011) 7

United States v. *Alvarez*,
__ U.S. __, 132 S. Ct. 2537 (2012) 7

Virginia v. *Black*,
538 U.S. 343 (2003).....5, 11

Watts v. *United States*,
394 U.S. 705 (1969).....8

Young v. *Am. Mini Theatres, Inc.*,
427 U.S. 50 (1976).....7

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Banks v. *Pelot*,
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Beslow v. *Sargent*,
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Bradley v. *Malen*,
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Caldwell v. *Mullins*,
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Doe v. *Doe*,
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Engler v. *Creekmore*,
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Fedele v. *Commonwealth*,
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Gilbert v. *State*,
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In Interest of C.B.,
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In re Interest of T.S.,
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In re Satterthwaite,
90 P.2d 325 (Cal. Ct. App. 1939) 16

Kampf v. *Kampf*,
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Melson v. *Tindal*,
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Sanders v. *Shephard*,
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Schramek v. *Bohren*,
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State ex rel. Fortin v. *Harris*,
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State ex rel. Williams v. *Marsh*,
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State ex rel. Yost v. Scouszzio,
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State v. *Gray*,
580 P.2d 765 (Ariz. Ct. App. 1978) 16

Tackett v. *State*,
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23 PA. CONS. STAT. ANN. § 6102 27

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D.C. CODE § 16-1003(a) 27

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D.C. CODE § 16-1004(b)(2) 20

D.C. CODE § 16-1005 20

D.C. CODE § 16-1005(d) 21

MD. CODE CTS. & JUD. PROC. § 3-1501 17

N.Y. Fam. Ct. Act § 812(1) 27

Other Authorities

5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS THE FEDERAL GOVERNMENT OF THE U.S. & OF VA. 18 (1803) 3, 15, 16

Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims, in* DO ARRESTS & RESTRAINING ORDERS WORK? 214 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) 26

Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary & Recommendations*, 43 JUV. & FAM. CT. J., No. 4 (1992) 19, 20

Page

Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law*, 21 HOFSTRA L. REV. 801 (1993) 17, 22, 23, 25, 27

Civil Protection Orders: Domestic Violence, Statutory Summary Charts, ABA COMM'N ON DOMESTIC VIOLENCE (Mar. 2014) 21, 27

D.C. COUNCIL, COMM. ON THE JUDICIARY, REPORT ON BILL 4-195 (May 12, 1982) 21

Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "the Truly National and the Truly Local,"* 42 B.C. L. REV. 1081 (2001) 20

Douglas L. Yearwood, *Judicial Dispositions of* Ex-Parte *& Domestic Violence Protection Order Hearings: A Comparative Analysis of Victim Requests and Court Authorized Relief*, 20 J. FAM. VIOLENCE 161 (2005) 29

Emily J. Sack, *Battered Women & the State: The Struggle for the Future of Domestic Violence Pol'y*, 2004 WIS. L. REV. 1657 (2004) 18, 19

Evan Stark, *Coercive Control*, *in* VIOLENCE AGAINST WOMEN: CURRENT THEORY & PRACTICE IN DOMESTIC ABUSE, SEXUAL VIOLENCE & EXPLOITATION 17 (Nancy Lombard & Lesley McMillan eds. 2013) 23

Page

James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES (1999) 22

Joanne Belknap et al., *The Roles of Phones & Computers in Threatening & Abusing Women Victims of Male Intimate Partner Abuse*, 19 DUKE J. GENDER L. & POL'Y 373 (2012) 24

Lori A. Zoellner et al., *Factors Associated With Completion of the Restraining Order Process in Female Victims of Partner Violence*, 15 J. INTERPERSONAL VIOLENCE 1081 (2000) 26

Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, NAT'L INST. OF HEALTH (2008) 24

MODEL PENAL CODE § 2.02(2)(c) 4, 32

MODEL PENAL CODE § 211.3 31

Pamela Powell & Marilyn Smith, *Domestic Violence: An Overview*, UNIV. OF NEV. COOP. EXTENSION (2011) 23

Ralph Blumenthal, *Stop Calling it Domestic Violence. It's Intimate Terrorism.*, COSMOPOLITAN (Apr. 16, 2013) 25

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RESTATEMENT (SECOND) OF TORTS § 614 (1977) 9

Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487 (2008).....20, 22

Susan L. Keilitz et al., *Civil Protection Orders: Victims' Views on Effectiveness*, U.S. DEP'T OF JUSTICE (Jan. 1998).....26

Victoria Holt et al., *Civil Protection Orders & Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS'N 589 (2002).....22

INTERESTS OF *AMICI CURIAE*[1]

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) is committed to combatting domestic violence through litigation, legislation, and policy initiatives. DV LEAP has extensive experience working with survivors of domestic violence and engaging in legal and policy reform efforts on their behalf, and has filed many *amicus curiae* briefs in this Court.

Prof. Margaret Drew is nationally recognized legal expert on domestic violence. She has represented survivors of intimate partner violence since 1981. She is Associate Professor and Director of Clinics and Experiential Learning at the University of Massachusetts Law School. Prof. Drew directed domestic violence clinics at the University of Cincinnati College of Law, the University of Alabama College of Law, and Northeastern University School of Law. Prof. Drew is a former chair of the American Bar Association's Commission on Domestic and Sexual Violence. She trains judges, lawyers, medical personnel, and others on the dynamics of domestic violence and related topics.

Amici share a profound concern for victims of domestic violence and a deep appreciation for the essential role played by the criminal and civil justice

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[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

systems in protecting victims of abuse, both of which are implicated by the Court's ruling in this case.

SUMMARY OF ARGUMENT

The court below affirmed petitioner's conviction under 18 U.S.C. § 875(c) for, *inter alia*, threatening to injure and kill his wife. His conviction was based on proof beyond a reasonable doubt that he knowingly and intentionally made threats that, in context, a reasonable person would view as a serious expression of an intent to injure and kill. Petitioner claims that the First Amendment provides an additional protection for his threat of domestic violence, namely that the government must also prove that he subjectively intended to threaten his wife.

1. Petitioner's argument is premised on a fundamental misunderstanding of First Amendment principles. Except in limited circumstances involving political speech or speech about public officials and public figures, the First Amendment does not impose any requirement of proof of subjective intent when the speech at issue inflicts significant immediate injury. The First Amendment permits objective standards to govern the determination of whether speech constitutes fighting words, is obscene, or has a defamatory meaning. In private figure libel cases involving speech on matters of public concern, liability for publishing a false statement of fact also is governed by an objective standard of reasonable care. Proof of a speaker's subjective intent is required only when core political speech on matters of public concern is at issue, such

as in incitement cases and public-official and public-figure libel claims. The First Amendment grants no such special protection to threats of domestic violence or other criminal behavior.

2. Petitioner's argument that his threats are entitled to special protection because they were disseminated online, or because they allegedly were inspired by rap music, should be rejected. The objective standard for threats followed by the court below fully takes into account the context in which a statement is made, eliminating any need to vary the constitutional requirements based on the mode of communication a speaker chooses to employ.

3. Strong historical support for interpreting the First Amendment as permitting an objective evaluation of true threats is found in the common law remedy of "swearing the peace," a remedy well-known to the Framers and still recognized by several states. At common law, as Blackstone explained, persons with "just cause to fear" injury or death by reason of another's "menaces, attempts or having lain in wait for him" could apply for and obtain a peace warrant. 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS THE FEDERAL GOVERNMENT OF THE U.S. & OF VA. 18 (1803). This historical practice of employing an objective standard for protection orders indicates that the First Amendment was never seen as limiting the government's ability to intervene in response to a speaker's threats of violence if those threats, when viewed in context, were reasonably

understood as a serious expression of an intent to harm the victim.

4. Imposing a constitutional requirement of a subjective intent to threaten in criminal cases could have far-reaching and deleterious effects on civil protection orders, which are critical to deterring and limiting recurring domestic violence. Most civil protection order cases involve conduct that is also criminal, and many states require proof of a "crime" to obtain a civil protection order. Despite being civil orders designed to protect, not to punish, these state law systems inevitably will be required to impose new barriers to orders of protection if petitioner's view of the First Amendment prevails, frustrating state efforts to protect at-risk domestic violence victims. Should the Court decide to impose a subjective intent requirement, the requirement should be strictly limited to criminal cases.

5. Finally, should the Court adopt a more protective standard for criminal prosecutions of threats of domestic abuse, that standard should not be a subjective inquiry into the speaker's intent. At most, criminal threats should require the objective standard of recklessness found in the Model Penal Code, which applies even to threats of terrorism. See MODEL PENAL CODE § 2.02(2)(c).

ARGUMENT

The jury below found beyond a reasonable doubt that petitioner (a) "knowingly" threatened to injure and kill his wife in his Facebook postings, *i.e.* he did so "intentionally and voluntarily, and not because of

ignorance, mistake, accident or carelessness," *United States* v. *Elonis*, 897 F. Supp. 2d 335, 341 n.5 (E.D. Pa. 2012); and (b) made those threats "intentionally," *i.e.* "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual," *id.*

Petitioner claims that the First Amendment requires more before a husband can be convicted of threatening to injure and kill his wife. According to petitioner, the government also must prove that he subjectively intended his statements as threats.[2] However, the First Amendment was not intended to provide "breathing space" for threats of domestic violence. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 271–272 (1964) (citation omitted); see generally *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966) (focus of First Amendment was to "protect the free discussion of governmental affairs").

Petitioner's approach should be rejected. It is a dangerous, unwarranted, and perverse extension of fundamental First Amendment principles. If adopted, it not only would subvert the criminal prosecution of true threats of domestic violence, but also would frustrate the ability of victims to obtain even civil legal protections based on such threats. In

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[2] There is no dispute that the government need not show the defendant intended to commit the threatened crime. *Virginia* v. *Black*, 538 U.S. 343, 359–360 (2003) ("The speaker need not actually intend to carry out the threat.").

short, petitioner's approach would open the floodgates to even greater victimization of abuse victims than is commonly seen today.

I. THE FIRST AMENDMENT DOES NOT REQUIRE PROOF OF SUBJECTIVE INTENT IN CASES INVOLVING THREATS OF DOMESTIC VIOLENCE.

A central premise of petitioner's constitutional argument is that the First Amendment requires proof of a speaker's subjective intent before speech can be the subject of governmental sanctions. Not so. Except in limited circumstances involving political speech or speech about public officials and public figures, the Court has not imposed any requirement of proof of subjective intent in cases where, as here, the very content of the communication inflicts a significant harm that the State rightly seeks to prevent. While speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), threats of domestic violence, like threats of other crimes, are entitled to no such protection.

A. Courts Have Long Used Objective Standards To Distinguish Protected And Unprotected Speech.

The First Amendment has long permitted courts to apply objective standards in myriad contexts, including fighting words, obscenity, and defamatory meaning, as well as in private-figure libel cases

involving speech on matters of public concern. Threats of domestic violence are entitled to no greater protection.

In *Chaplinski* v. *New Hampshire*, 315 U.S. 568, 573 (1942), for example, the Court upheld a criminal conviction under a statute prohibiting the use in a public place of words "likely to cause a breach of the peace." Like petitioner, the defendant in that case claimed that the First Amendment required the trial court to permit him to testify about his "mission" ("to preach the true facts of the Bible") at the time he uttered the offending words. *Id.* at 570. The Court rejected the argument, citing with favor the lower court's application of an objective standard for evaluating the speech at issue:

> The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings.

Id. at 573 (quotation and alterations omitted); see generally *Young* v. *Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("[I]t is the content of [an] utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'").[3]

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[3] See *United States* v. *Alvarez*, __ U.S. __, 132 S. Ct. 2537, 2544 (2012) (describing the "fighting words" doctrine as among

Watts v. *United States*, 394 U.S. 705, 708 (1969), similarly applied an objective standard in a true threats prosecution. In holding that a "crude offensive method of stating a political opposition to the President" could not reasonably be construed as a true threat, the Court relied on the context in which the statement was made, the conditional language employed, and the audience's reaction—all factors considered under the objective standard applied in this case. *Id.*

Obscenity prosecutions also are governed by an objective, not a subjective, standard. See generally *Miller* v. *California*, 413 U.S. 15, 24 (1973). In *Hamling* v. *United States*, 418 U.S. 87, 120 (1974), for example, the Court rejected a defendant's argument that a conviction on obscenity charges requires proof both of knowledge of the contents of the material and subjective awareness of the material's obscene character. "It is constitutionally sufficient," held the Court, "that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Id.* at 123; see also *Smith* v. *California*, 361 U.S. 147, 153 (1959) (for obscenity law to be constitutionally applied to a book distributor, it must be shown that he had "knowledge of the contents of the book");

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the "historic and traditional categories [of expression] long familiar to the bar" and stating that the "vast realm of free speech and thought * * * can still thrive, and even be furthered, by adherence to those categories") (citations omitted) (brackets in original); see also *Snyder* v. *Phelps*, __ U.S. __, 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring); *id.* at 1223 (Alito, J., dissenting).

Ginsberg v. *New York*, 390 U.S. 629, 643–644 (1968) (requirement that defendant had "knowledge of" or "reason to know" of the character and content of the material is sufficient); *Rosen* v. *United States*, 161 U.S. 29, 41 (1896) (regardless of whether the defendant "knew or believed that such [material] could be properly or justly characterized as obscene," so long as the content of the work was obscene and the work "was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete").

Finally, in civil and criminal libel cases, an objective standard governs whether a statement has a defamatory meaning, *i.e.* whether the publication "would hurt the plaintiff in the estimation of an important and respectable part of the community." *Peck* v. *Tribune Co.*, 214 U.S. 185, 190 (1909). See generally *Garrison* v. *Louisiana*, 379 U.S. 64, 65 n.1, 78 (1964); *Beauharnis* v. *Illinois*, 343 U.S. 250, 255 n.5 (1952). "The court determines whether the communication is capable of bearing the meaning ascribed to it by the plaintiff and whether the meaning so ascribed is defamatory in character." RESTATEMENT (SECOND) OF TORTS § 614, cmt. *b* (1977). The jury then determines whether the statement, if "capable of a defamatory meaning, was so understood by its recipient." *Id.*, § 614(2). There is no First Amendment requirement that the defendant subjectively intend the statement at issue to be defamatory.

Other aspects of defamation claims also are governed by an objective standard. Even when the speech at issue is a matter of public concern, a

speaker who publishes false statements about a private figure is held to the objective standard of reasonable care. See *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 770 (1986); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

B. Proof Of A Speaker's Subjective Intent Is Limited To Core Protected Speech On Matters Of Public Concern.

The Constitution requires proof of a speaker's subjective intent only in cases involving core First Amendment speech on matters of public concern. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444, 446 (1969) (Ku Klux Klan rally protesting alleged governmental "suppress[ion]" of the "Caucasian race"); *Dennis* v. *United States*, 341 U.S. 494, 497 (1951) (Communist Party organizers charged with advocating the overthrow of the United States government); *Abrams* v. *United States*, 250 U.S. 616, 620 (1919) (leaflets decrying "the President's shameful, cowardly silence about the intervention in Russia").

There is good reason, moreover, to impose a subjective intent requirement in incitement cases, while not in true-threat cases. A true threat inflicts injury on its intended audience, *i.e.* the victim placed in fear. Incitement, in contrast, creates a possible future risk of harm to third parties against whom an inflamed audience may take unlawful action. Because no present, actual injury is required in incitement cases, proof of subjective intent is a necessary safeguard against government censorship and oppression. That is not so in cases of domestic

violence threats, where the injury is suffered immediately upon communication of the threat.[4]

In the civil and criminal defamation contexts, only cases involving speech concerning public officials and public figures require proof of the defendant's state of mind, and even then only with respect to the element of falsity (bút not the defamatory meaning) of statements at issue. See *Sullivan*, 376 U.S. at 279–280; *Garrison*, 379 U.S. at 67; *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 134–135 (1967). This special protection for public-official and public-figure cases exists because of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and * * * may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 367 U.S. at 270. There is no comparable commitment to promoting threats of domestic violence, and there is no comparable justification for imposing a subjective intent requirement in such private speech cases.

Nor does *Virginia* v. *Black*, discussed at length in the parties' briefs, require otherwise. *Black* involved a statutory requirement of proof of subjective intent. 538 U.S. at 347–348. In addition, the statute at issue in *Black* applied to only one specific mode of symbolic speech (cross-burning), a form of expression which the Court found sometimes carries a political message and sometimes is used purely for intimidation. *Id.* at 354–357. This case, in contrast,

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[4] This is true even when a spouse later claims that the threats were made in jest, Pet. Br. 10, or were a form of "art" beyond the ken of their victims., *id.* at 12.

involves a statute that applies to "any threat to injure the person of another," so long as the threat was made knowingly and intentionally and so long as a reasonable person would foresee that, viewed in context, the threat expresses a serious intention to kill or injure. In such a case, "[i]t is constitutionally sufficient that the prosecution show that [petitioner] had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U.S. at 123. To require further proof that he intended the reasonable consequences of his intentional conduct would amount to allowing him to escape punishment simply by claiming that he did not understand the reasonable meaning of his own words. Cf. *id.* at 123–124 (requiring proof of the defendant's subjective awareness of material's obscene character would allow a "defendant to avoid prosecution by simply claiming that he had not brushed up on the law").

C. The First Amendment Does Not Grant Special Protections To Social Media Or Rap Music.

Petitioner suggests that his threats are entitled to heightened First Amendment protections because they were disseminated by use of the Internet and because he allegedly was inspired by rap music. Perhaps similar claims were made by the first person charged with making a death threat conveyed by telegraph or telephone. Petitioner's argument should be equally unavailing.

Reduced to essentials, petitioner's argument fails for the same reason that the Court has rejected claims made by print journalists that so long as statements of fact are labeled "opinion" and inserted in articles called "columns" they are immune from liability. *Milkovich* v. *Lorain Journal*, 497 U.S. 1, 21 (1990). So too here, the First Amendment does not place form over substance. The dispositive issue is not whether a threat is delivered in person, by letter, or by email, Facebook, tweet, or blog. Such factors are all part of the context in which a communication is made and should be fully considered under the reasonable person standard. No special standard is necessary or appropriate.

As the Court has noted in an analogous context, "it would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Id.* at 19 (citation omitted). It would be equally destructive of the compelling interests served by laws criminalizing true threats to permit those who threaten domestic violence to escape liability simply by testifying "I was only kidding."

In this case, for example, the fact that petitioner posted his threats on Facebook was considered by the jury pursuant to trial court's instruction to consider whether petitioner's statements were made in a "context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life

of an individual." *Elonis*, 897 F. Supp. 2d at 342 n.5. Once that test is met by proof beyond a reasonable doubt, the requirements of the First Amendment are satisfied, no matter by what mode of communication the threat was conveyed.

II. SINCE THE TIME OF THE FRAMERS, ORDERS TO PREVENT THREATENED VIOLENCE HAVE BEEN PERMITTED WITHOUT PROOF OF SUBJECTIVE INTENT.

Evidence of the appropriate First Amendment standard for threats can be found in the robust historical record involving orders enjoining future threatening conduct.[5] See generally *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 604 (1982) ("[T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices."). Such orders were well-established before the Constitution's adoption, and were based not on the subjective intent of the alleged threatener, but on the victim's reasonable basis for fear.

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[5] See *Beslow* v. *Sargent*, 76 N.W. 1129, 1130 (Minn. 1898) ("[A]t common law * * *, whenever a private person had just cause to fear that another would do him injury, he might demand surety of the peace against such person, on making oath that he was actually under fear of death or bodily harms, and showing just cause for such apprehension, and that he was not doing this out of malice or mere vexation."); see generally *Melson* v. *Tindal*, 1 Del. Cas. 79, 79 (Com. Pl. 1795); *Tackett* v. *State*, 11 Tenn. 392, 393–394 (1832); *Bellows* v. *Shannon*, 2 Hill 86, 86–87 (N.Y. Sup. Ct. 1841).

The power to enter orders preventing threats of violence has its roots in English common law. Blackstone described a remedy that "[w]ives may demand * * * against their husbands; or husbands, if necessary, against their wives." 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS THE FEDERAL GOVERNMENT OF THE U.S. & OF VA. 18 (1803) (hereinafter *Blackstone*). The cause arose "only from a probable suspicion[] that some crime is intended or likely to happen." *Id.* It was a form of "preventive justice" that obliged those from whom there was "probable ground to suspect * * * future misbehavior[] to stipulate with and give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges and securities for keeping the peace, or for their good behavior." *Id.*

As Blackstone explained, at common law, anyone with "just cause to fear that another" would "do him a corporal injury, by killing, imprisoning, or beating him," had the right to "demand surety of the peace against such person." *Id.* All that was required was that the victim "make oath[] that he is actually under fear of death or bodily harm," and that "he has just cause * * * by reason of the other's menaces, attempts, or having lain in wait for him." *Id.*

This procedure was called "swearing the peace against another." *Id.* A party who did not produce the required sureties could "immediately be committed till he" did. *Id.* The sureties were "forfeited by any actual violence, or even an assault

or menace, to the person[s] * * * who demanded" them. *Id.*

In short, during and after the Framing era, only "just cause to fear" and actual fear were required in order to obtain an injunction against threatened violence.

Proceedings to "keep the peace," with elements of both criminal and civil actions, carried over into the twentieth century. See *Fedele* v. *Commonwealth*, 138 S.E.2d 256, 259 (Va. 1964) ("A proceeding in which security is required to be given for good behavior and to keep the peace is more in the nature of a criminal, or quasi criminal, rather than civil, procedure.") (citing *State ex rel. Yost v. Scouszzio*, 27 S.E.2d 451, 453–454 (W. Va. 1943)); see also *Bradley* v. *Malen*, 164 N.W. 24, 25 (N.D. 1917) ("Such proceeding is not a prosecution for the commission of an offense, but is a criminal or quasi criminal proceeding to prevent the commission of a crime.").

Into the late twentieth century, states continued to apply an objective standard in determining whether an order to keep the peace should issue. See, e.g., *Caldwell* v. *Mullins*, 553 N.E.2d 1083, 1084–1085 (Ohio Ct. App. 1990); *State* v. *Gray*, 580 P.2d 765, 766 (Ariz. Ct. App. 1978); *State ex rel. Fortin* v. *Harris*, 253 A.2d 830, 830 (N.H. 1969); *Fedele*, 138 S.E.2d at 258–259; *In re Satterthwaite*, 90 P.2d 325, 325 (Cal. Ct. App. 1939); *Engler* v. *Creekmore*, 119 S.W.2d 497, 498 (Ark. 1938); *Areson* v. *Pincock*, 220 P. 503, 504 (Utah 1923); *Bradley*, 164 N.W. at 25; *Cox* v. *State*, 47 So. 1025, 1026 (Ala. 1908).

This historical practice of employing an objective standard for peace warrants indicates that legal restraints on threatening behavior, based on a purely objective inquiry into the reasonable fear of the victim of the threat, has always co-existed without implicating the First Amendment. This historical record also strongly supports *Amici's* particular concern—discussed below—that petitioner's view of the First Amendment would undermine protection-order practices and reduce legal protections for victims of abuse and terrorizing.

III. A RULING THAT THE FIRST AMENDMENT REQUIRES PROOF OF SUBJECTIVE INTENT TO THREATEN COULD EVISCERATE MODERN CIVIL PROTECTION ORDERS.

While "peace orders" still exist to varying degrees in some states, see, e.g., *Quansah* v. *State*, 53 A.3d 492, 500–501 (Md. Ct. Spec. App. 2012); MD. CODE CTS. & JUD. PROC. § 3-1501 *et seq.*, since 1970 another, more targeted type of violence preventive order has become a dominant remedy specifically for victims of domestic violence: civil protection orders.[6] Should this Court rule in favor of petitioner by holding that subjective intent to threaten must be

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[6] The types of relationships covered by states' protection-order laws have evolved over time, ranging from marriage to dating relationships to ex-partners and other family members. See generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law*, 21 HOFSTRA L. REV. 801, 814–842 (1993) (hereinafter Klein & Orloff). In contrast, peace orders were historically not limited to particular relationships.

proven in criminal threats prosecutions, such a ruling inevitably will carry over to the civil protection order context as well.

Even if the ruling is framed as a purely criminal law doctrine, the criminal law casts a long shadow over civil protection order practice; indeed, many states require proof of a "crime" before a protective order may issue. Moreover, should subjective intent be framed as a blanket First Amendment requirement, it will directly control protection order proceedings as well. These orders are critical to the deterrence and limitation of domestic violence. Thus, although this case involves a criminal prosecution, a decision in petitioner's favor would inevitably undermine this most critical remedy for victims of abuse.

A. Protection Orders Are Essential To Protect Adults And Children At Risk Of Ongoing Abuse.

While in Blackstone's time peace orders may have been available to husbands and wives, for most of the twentieth century domestic violence was too often treated as a private family matter not appropriate for the criminal justice system. See, e.g., Emily J. Sack, *Battered Women & the State: The Struggle for the Future of Domestic Violence Pol'y*, 2004 WIS. L. REV. 1657, 1663–1664 (2004) (hereinafter Sack).

As modern society began to turn its attention to this problem, the first and arguably most important legal remedy for domestic violence became the civil

protection order. As a leading domestic violence lawyer wrote:

> A new remedy was needed. One that would enjoin the perpetrator from future abuse. One that would not displace the abused woman from her home but could compel relocation of the abuser. * * * One that could provide stability and predictability in the lives of women and children. * * * One that could afford economic support so that the abused woman would not be compelled to return to the abuser to feed, clothe and house her children. * * * One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders[7] were this new remedy.

Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary & Recommendations*, 43 JUV. & FAM. CT. J., No. 4, at 23 (1992) (hereinafter Hart).

First invented in the District of Columbia in 1970, civil protection orders eventually were adopted by every State, and are an essential *protective* legal remedy for victims of abuse. See Sack, *supra*, at 1667; *Cruz-Foster* v. *Foster*, 597 A.2d 927, 931 (D.C. 1991) (the IntraFamily Offenses Act "was designed to counteract the abuse and exploitation of women and children" through establishment of a civil

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[7] Names for these civil protective proceedings vary from state to state, *e.g.*, "civil protection orders," D.C. CODE § 16-1003, "protection from abuse orders," 23 PA. CONS. STAT. ANN. § 6101 *et seq.* This brief uses the terms "civil protection orders" and "protection orders" to refer to all such remedies.

injunctive remedy); see also Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1503–1504 (2008) (citations omitted) (hereinafter Goldfarb).

Civil protection orders are designed to offer flexible remedies, tailored to a victim's particular circumstances. Hart, *supra*, at 23–24. They can enjoin abusers from further abusing the victim, while also containing a variety of other specific family-related remedies, including child support, temporary custody and visitation arrangements, and monetary remedies. See D.C. CODE § 16-1005; Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "the Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1108–1109 (2001). In almost all states, when harm seems imminent, a victim of domestic violence can seek an emergency protection order, which is obtained through an *ex parte* hearing and is very time-limited. See, e.g., D.C. CODE § 16-1004(b)(2) (noting that "[a]n initial temporary protection order shall not exceed [fourteen] days"); Goldfarb, *supra*, at 1506.[8]

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[8] The *ex parte* process has been repeatedly found to comport with constitutional due process rights. See *Baker* v. *Baker*, 494 N.W.2d 282, 286–288 (Minn. 1992) (finding state's Domestic Abuse Act provision granting *ex parte* protection order fulfills procedural due process requirements when it requires petitioner to show "immediate and present danger of domestic abuse" and to provide an affidavit made under oath stating specific facts, and when "it is undisputed that notice to the opposing party could exacerbate the risk of abuse"), *superseded by statute on other grounds*, *Burkstrand* v. *Burkstrand*, 632 N.W.2d 206, 212 (Minn. 2001); accord *Kampf* v. *Kampf*, 603

A full adversarial hearing is required in order to generate a full civil protection order, which, depending on the state, may extend for one or more years. See *Civil Protection Orders: Domestic Violence, Statutory Summary Charts,* ABA COMM'N ON DOMESTIC VIOLENCE (Mar. 2014) (hereinafter ABA Chart), *available at* http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf; see also D.C. CODE § 16-1005(d) (civil protection order may issue for up to one year).

Like peace orders, protection orders are not aimed at punishing potential abusers, but rather at *protecting* victims by enjoining recurring threats and abuse. *Cruz-Foster*, 597 A.2d at 929 (the IntraFamily Offenses Act "was designed to protect victims of family abuse from acts and threats of violence"); see also D.C. COUNCIL, COMM. ON THE JUDICIARY, REPORT ON BILL 4-195, at 2, 10 (May 12, 1982) (adding a private right of action under the IntraFamily Offenses Act in order to enable victims to seek their own civil protection orders and to ensure that the remedy effectively protects victims); *Cloutterbuck* v. *Cloutterbuck*, 556 A.2d 1082, 1086 (D.C. 1989) (the government's interest in protection order proceedings is "to protect potential victims of domestic violence").

N.W.2d 295, 299 (Mich. Ct. App. 1999); *Sanders* v. *Shephard*, 541 N.E.2d 1150, 1155 (Ill. App. Ct. 1989); *State ex rel. Williams* v. *Marsh*, 626 S.W.2d 223, 232 (Mo. 1982).

Protection orders alone—distinct from their enforcement[9]—actually effectuate the goal of prevention to a greater degree than may be widely realized. See Goldfarb, *supra*, at 1510–1512 (surveying research indicating substantial rates of victim satisfaction as well as batterer compliance, although approximately half of batterers violated orders in some (usually non-physical) way); Victoria Holt et al., *Civil Protection Orders & Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS'N 589, 593 (2002). It has become apparent that an authoritative legal and social statement that abuse is unjust and impermissible, even without sanctions or punishment, can powerfully affect both perpetrators and victims. See James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 164–165 (1999) (eighty-six percent of women said protection order either stopped or reduced the abuse). "For a number of women, the restraining order process seems to have strengthened their sense that the violence was unjust," and the state's intervention reduced the batterer's power over them. *Id.* 164–165 "[B]y taking action, they had forced a shift in the balance of power." *Id.*

Civil protection orders are thus deemed a—if not the—critical legal remedy for individuals whose intimate partners or family members pose an ongoing threat to their safety and peace of mind. Goldfarb, *supra*, at 1504 (citations omitted).

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[9] In most states, violations of protection orders are punishable as a misdemeanor and/or contempt of court. See Goldfarb, *supra*, at 1509; Klein & Orloff, *supra*, at 1095–1120.

B. Threats Are The Essence Of Domestic Violence And Most Protection Order Cases.

Abusers use threats as a method of intimidation and control, traumatizing and "deflat[ing] the victim's will to resist." Evan Stark, *Coercive Control*, *in* VIOLENCE AGAINST WOMEN: CURRENT THEORY & PRACTICE IN DOMESTIC ABUSE, SEXUAL VIOLENCE & EXPLOITATION 17, 23 (Nancy Lombard & Lesley McMillan eds. 2013) (hereinafter Stark); see also Klein & Orloff, *supra*, at 859 ("[T]hreats of violence or acts which place the petitioner in fear of imminent bodily harm * * * are acts of domestic violence because they seek to intimidate and control the petitioner."). Some victims of domestic violence may never be physically abused, "yet the threat of physical assault is so pervasive, [they] fear they will be." Pamela Powell & Marilyn Smith, *Domestic Violence: An Overview*, UNIV. OF NEV. COOP. EXTENSION, at 2 (2011), *available at* http://www.unce.unr.edu/publications/files/cy/2011/fs1176.pdf.

Often, perpetrators threaten not only the victim, but also the victim's children, family, friends, and pets. See *id.*; Stark, *supra*, at 24. Because violence typically escalates after a victim separates from her abuser, separated women are particularly vulnerable to continued threats and stalking from their current or former husbands or intimate partners. Those who shelter them often become targets too. Klein & Orloff, *supra*, at 838. Threats and stalking often last for months or years after separation, causing many victims of domestic violence to avoid seeking help

from friends or family lest they too be put in danger. *Id.*

Threats have serious and long-lasting psychological and emotional consequences for victims of domestic violence. In fact, women who are battered generally "identify psychological abuse as inflicting greater distress compared to physical acts of violence." Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, NAT'L INST. OF HEALTH, at 2 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2967430/pdf/nihms245802.pdf. Threats, harassing behaviors, and emotional and verbal abuse are significant contributors to post-traumatic stress symptoms in women who have been battered. *Id.* at 8. Even when assaults have not yet occurred, women who have been battered can suffer severe harm from threats because of the uncertainty of whether—or when—they will be carried out. Stalking and harassment pose an "unpredictable yet omnipresent threat * * * [that] may result in hypervigilant behavior and symptoms of hyperarousal as a function of the unpredictable nature of the traumatic stressor." *Id.* at 10.

Finally, threats and harassment are an important predictor of actual physical attacks. Such threats often escalate and culminate in acts of physical violence. See *id.*; Joanne Belknap et al., *The Roles of Phones & Computers in Threatening & Abusing Women Victims of Male Intimate Partner Abuse*, 19 DUKE J. GENDER L. & POL'Y 373, 378 (2012) (indicating that abusers' threats of violence are "highly predictive of actual violence" against

their victims, and that "threats of violence by former partners who are * * * stalking are an even better predictor of future violence than the prior violence used by these ex-partners"); Klein & Orloff, *supra*, at 860–861. In fact, one study found that of the women killed by their abusers, 41–50% had previously been threatened with death, and 39% had been threatened or assaulted with a weapon. Klein & Orloff at 859. Thus, victims' fears in response to threats are well-founded.

Ashleigh Lindsey's story is unfortunately not atypical. In 2012, twenty-year-old Lindsey obtained a protection order and fled from her boyfriend of six months, Joshua Mahaffey, to escape his emotional and physical abuse after finding out she was three weeks pregnant. Despite having changed her phone number several times and leaving the state, Mahaffey was able to obtain her information and continue harassing Lindsey. Mahaffey repeatedly threatened to kill Lindsey and her family in Texas if she returned home. He and a friend continuously called Lindsey, insisting she drop the abuse charges. Mahaffey also called Lindsey's work place, threatening to come and harm the employees. A few months later, Mahaffey eventually tracked Lindsey down the day before she planned to enter a shelter for battered women. Mahaffey shot and killed Lindsey, and then himself. Her unborn child died soon thereafter. Hours before killing Lindsey, Mahaffey had posted a photograph of a .22 caliber revolver to his Facebook page. See Ralph Blumenthal, *Stop Calling it Domestic Violence. It's Intimate Terrorism.*, COSMOPOLITAN (Apr. 16, 2013),

available at http://www.cosmopolitan.com/sex-love/advice/a4322/intimate-terrorism/.

In short, threats are integral to most domestic violence cases, and are typically at the top of the list of behaviors that protection orders enjoin. See Lori A. Zoellner et al., *Factors Associated With Completion of the Restraining Order Process in Female Victims of Partner Violence*, 15 J. INTERPERSONAL VIOLENCE 1081, 1085–1088 (2000) (noting that 48 percent of women interviewed in a Philadelphia study were prompted to seek a civil protection order after being threatened "in such a way that they believed their life was in danger"); Susan L. Keilitz et al., *Civil Protection Orders: Victims' Views on Effectiveness*, U.S. DEP'T OF JUSTICE (Jan. 1998) (finding that in a study of three jurisdictions in the United States, ninety-nine percent of women "had been intimidated through threats, stalking, and harassment" before receiving protection orders), *available at* https://www.ncjrs.gov/pdffiles/fs000191.pdf; Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in* DO ARRESTS & RESTRAINING ORDERS WORK? 214, 237 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (eighty-nine percent of women seeking restraining orders reported threats or property damage).

C. Protection Proceedings Parallel—And Are Influenced By—Criminal Law Norms.

Given that most protection order proceedings involve conduct which is independently criminal,[10] judges in these proceedings are inevitably influenced by and cognizant of the criminal implications of the civil proceedings. In fact, approximately 18 states require litigants to *prove the crime of threats* in order to receive a *civil* protection order based on threats. See, e.g., D.C. CODE § 16-1003(a); N.Y. Fam. Ct. Act § 812(1); 23 PA. CONS. STAT. ANN. § 6102; ABA Chart, *supra*.

Thus, it is not uncommon for judges to reference the criminal law in adjudicating a civil protection order. For instance, *Amici* have been before judges who expressed concern about making findings of child abuse for purposes of visitation or protection orders because they believe their civil finding may expose the respondent to criminal prosecution. Judges sometimes express concern about civil protection proceedings being a substitute for a criminal prosecution.[11]

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[10] See Klein & Orloff, *supra*, at 848-874; ABA Chart, *supra*.

[11] In a recent oral argument in the D.C. Court of Appeals concerning the scope of a "vacate the home" remedy in the protection order statute, one appellate judge expressed concern about the possibility that making such "vacate orders" available to victims of sexual assault in civil protection orders would allow asserted victims to use such orders as an end run around criminal prosecution. E-mail from Rachel Applestein to

Similarly, *Amici* have heard of and appeared in cases where judges considered imposing criminal defendants' procedural rights within these civil proceedings. Indeed, some courts explicitly adopt constitutional criminal procedures, such as the confrontation right, in civil proceedings such as child protection or custody and visitation. See *In Interest of C.B.*, 574 So. 2d 1369, 1374 (Miss. 1990) (holding that "the right of confrontation should be accorded to an accused parent" when petitioner for child alleged child's father sexually abused the child, because such accusation is so shameful that civil courts shall ensure that parents are not wrongfully accused); *Doe* v. *Doe*, 644 So. 2d 1199, 1210 (Miss. 1994) (stating in a custody case that the accused's right to confront witnesses is a fundamental right and so "any attempt to abridge" it must survive "strict scrutiny," and reversing lower court's termination of father's visitation rights because of sexual abuse); *In re Interest of T.S.*, 732 S.E.2d 541, 542 (Ga. Ct. App. 2012) (relying on Confrontation Clause language from a criminal case to define the right to confrontation in a civil parental termination hearing).

Thus, should this Court rule that a threat may not be prosecuted criminally unless the subjective intent of the defendant can be proven, this standard will inevitably carry over to the civil protection order context. Because defendants can be expected in most cases to deny having the requisite subjective intent, imposing such a standard will create a

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Joan Meier (Sept. 18, 2014); E-Mail from Luke Meisner (Sept. 29, 2014).

significant hurdle to the issuance of protection orders for victims in appropriate fear for their own and their loved ones' safety. Even though protection orders in no way punish or sanction the persons found to have committed the threats, such preventive and protective measures will have been rendered far more difficult.

D. A First Amendment Ruling In Favor Of Elonis Will Also Preclude Protection Of At-Risk Domestic Violence Victims.

Protection order proceedings will also be directly affected by any ruling based on the First Amendment in this case. Scholars have noted that judges sometimes restrict the scope of civil protection orders because they are especially concerned with offenders' constitutional and due process rights. Douglas L. Yearwood, *Judicial Dispositions of* Ex-Parte *& Domestic Violence Protection Order Hearings: A Comparative Analysis of Victim Requests and Court Authorized Relief*, 20 J. FAM. VIOLENCE 161, 161 (2005).

First Amendment challenges in protection order proceedings, while not necessarily common, are not infrequent. See, e.g., *Banks* v. *Pelot*, 460 N.W.2d 446 (Wis. Ct. App. 1990) (table) (appealing an order enjoining respondent from harassing petitioner on grounds that the injunction was impermissibly broad); *Peters-Riemers* v. *Riemers*, 624 N.W.2d 83, 89 (N.D. 2001) (respondent argued that protection order violated his constitutional right to free speech

because it restrained him from having any contact with petitioner).

To *Amici's* knowledge, courts to date have used various rationales for rejecting First Amendment defenses, including the assertion that threats are not constitutionally protected in the domestic violence context, *Gilbert* v. *State*, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) ("We first reject any notion that the First Amendment to the United States Constitution * * * ever covered threatening or abusive communications to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse."); that the context, time, and place of respondent's "picketing" render it unprotected, *Kreuzer* v. *Kreuzer*, 761 N.E.2d 77, 80 (Ohio Ct. App. 2001) (finding that although former husband's picketing activities would possibly qualify as protected speech in another context, targeting his former wife's home, located on an unlit back street, after dark, did not qualify as protected speech); and that the Constitution does not create a right to force one to endure speech over their objection in their own home, *Schramek* v. *Bohren*, 429 N.W.2d 501, 506 (Wis. Ct. App. 1988) ("Even if the sanctions of the statute indirectly prohibit speech, the state can ban speech directed primarily at those who are unwilling to receive it" because "[i]ndividuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom.").

However, a ruling that the First Amendment requires proof of subjective intent in prosecutions for domestic abuse threats would jeopardize the

protections afforded victims in the cases cited above, and in countless comparable situations. Should the Court require proof of subjective intent in true threat prosecutions, *Amici* respectfully urge the Court to distinguish and carefully safeguard civil protection orders from its holding.

IV. IF AN INTENT REQUIREMENT IS ADOPTED, RECKLESSNESS SHOULD SUFFICE.

Even if the First Amendment required that threats of domestic violence are entitled to some heightened level of protection, the appropriate standard would not be proof of a subjective intent to convey a threat. Drawing distinctions between equally destructive and disruptive threats made by two speakers based on their undisclosed subjective intent would frustrate the compelling state interests underlying statutes criminalizing true threats without any countervailing benefit to the free exchange of ideas.

A more appropriate alternative standard would be the objective standard of recklessness found in the Model Penal Code. Section 211.3 of the Model Penal Code, for example, provides that a person is guilty of a felony in the third degree if he "threatens to commit any crime of violence with a purpose to terrorize another * * * or in reckless disregard of the risk of causing such terror * * *." MODEL PENAL CODE § 211.3.

Under this standard, "[a] person acts recklessly with respect to a material element of an offense

when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." MODEL PENAL CODE § 2.02(2)(c); see also *J.I. Case Credit Corp.* v. *First Nat'l Bank*, 991 F.2d 1272, 1278 (CA7 1993) ("To consciously ignore or to deliberately close one's eyes to a manifest danger is recklessness, a mental state that the law commonly substitutes for intent or actual knowledge"). "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c); see also *Bullock v. BankChampaign, N.A.*, __ U.S. __, 133 S. Ct. 1754, 1759–1760 (2013).

Although *Amici* respectfully submit that the current objective standard for a true threat passes First Amendment scrutiny, if an alternative standard were to be adopted for criminal prosecutions, an objective standard of recklessness would strike a far better balance between the competing interests at stake than would a subjective "intend-to-threaten" standard.

CONCLUSION

For the foregoing reasons, and those in respondent's brief, the Court should affirm the judgment.

Respectfully submitted,

JOAN S. MEIER
DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 G Street, N.W.
Washington, D.C. 200052
(202) 994-2278

DAVID B. SALMONS
COUNSEL OF RECORD
JONATHAN M. ALBANO
STEPHANIE SCHUSTER
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373–6000
david.salmons@bingham.com

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AMICUS CURIAE BRIEF

No. 13-983

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF OF THE MARION B. BRECHNER FIRST AMENDMENT PROJECT AND RAP MUSIC SCHOLARS (PROFESSORS ERIK NIELSON AND CHARIS E. KUBRIN) IN SUPPORT OF PETITIONER

CLAY CALVERT
Counsel of Record
MARION B. BRECHNER
FIRST AMENDMENT PROJECT
2060 Weimer Hall
Gainesville, FL 32611
(352) 273-1096
ccalvert@jou.ufl.edu

Counsel for Amici Curiae

August 18, 2014

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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CASES:

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Citizens United v. Federal Election Commission,
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Cohen v. California,
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Illinois v. Oduwole,
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New Jersey v. Skinner,
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United States v. Elonis,
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STATUTES:

18 U.S.C. § 875(c) 2, 3, 5, 11, 24

OTHER AUTHORITIES:

Ernest Allen, Jr., *Message Rap*, *in* DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 159 (William Eric Perkins ed., 1996) 11

Sally Banes, *Physical Graffiti: Breaking is Hard to Do*, *in* AND IT DON'T STOP 6 (Raquel Cepeda ed., 2004) 8

NOTORIOUS B.I.G., *Things Done Changed*, *on* READY TO DIE (Bad Boy Records 1994) 23

Peter Blecha, TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS (2004) 18

Adam Bradley, BOOK OF RHYMES: THE POETICS OF HIP HOP (2009) 9

Adam Bradley & Andrew DuBois, THE ANTHOLOGY OF RAP (2010) 9, 10

Jeff Chang, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION (2005) 6

Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007) 20

Michael Eric Dyson, KNOW WHAT I MEAN? REFLECTIONS ON HIP HOP (2007) 12, 19

Mark Edmundson, *Poetry Slam: Or, the Decline of American Verse*, HARPER'S MAG., July 2013, at 65 21

EMINEM, *Sing for the Moment*, *on* THE EMINEM SHOW (Aftermath 2002) 15

Murray Forman, THE 'HOOD COMES FIRST: RACE, PLACE, AND SPACE IN RAP AND HIP HOP (2002) 12

Carrie Fried, *Who's Afraid of Rap? Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999) 20

Virginia C. Fowler, NIKKI GIOVANNI: A LITERARY BIOGRAPHY (2013) 14

Henry Louis Gates, Jr., THE SIGNIFYING MONKEY (1988) 9

Patrick Goldstein, *The Hard Cold Rap of Ice-T*, L.A. TIMES, Apr. 24, 1988, http://articles.latimes.com/1988-04-24/entertainment/ca-2445_1_rap-wizard 23

Tipper Gore, *Hate, Rape, and Rap*, WASH. POST, Jan. 8, 1990 19

Travis L. Gosa, *Why Do Students Resist Hip Hop Studies?*, *in* TEACHING POLITICS BEYOND THE BOOK: FILM, TEXT, AND NEW MEDIA IN THE CLASSROOM 109 (Robert W. Glover & Daniel Tagliarina eds., 2013) 22

Corinne Heller, *Eminem's Daughter, Hailie Jade Scott Mathers, 18, Graduates High School (With Honors) & Pays Tribute to Parents*, E! ONLINE NEWS, June 29, 2014, *available at* http://www.eonline.com/news/555402/eminem-s-daughter-hailie-jade-scott-mathers-18-graduates-high-school-with-honors-pays-tribute-to-parents 16

Hip-hop on Trial. INTELLIGENCE SQUARED AND GOOGLE+ "VERSUS" DEBATE SERIES, June 27, 2012, http://www.youtube.com/watch?v=r3-7Y0xG89Q 19, 23

Cheryl L. Keyes, RAP MUSIC AND STREET CONSCIOUSNESS (2002) 8

Bakari Kitwana, THE RAP ON GANGSTA RAP (1994) 14

Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52.3 SOC. PROBS. 360 (2005) 13

Charis E. Kubrin & Erik Nielson, *Rap on Trial*, RACE & JUST. (published online before print Mar. 7, 2014), available at doi: 10.1177/2153368714525411 ..... 15, 20

George Lipsitz, FOOTSTEPS IN THE DARK: THE HIDDEN HISTORIES OF POPULAR MUSIC (2007) 18, 19

Theresa Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40.2 SOC. PERSP. 265 (1992) 12

Erik Nielson, *"Can't C Me": Surveillance and Rap Music*, 40.6 J. BLACK STUD. 1254 (2010) 18

Erik Nielson, *"Here Come the Cops": Policing the Resistance in Rap Music*, 15.4 INT'L J. CULTURAL STUD. 349 (2011) 19-20

N.W.A., *Fuck tha Police*, *on* STRAIGHT OUTTA COMPTON (Ruthless Records 1988) 17

Imani Perry, PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP (2004) 13

Petition for Writ of Certiorari, *Elonis v. United States*, No. 13-983, 2013 U.S. Briefs 983; 2014 U.S. S. Ct. Briefs LEXIS 599 (Feb. 14, 2014) .. 16

Russell A. Potter, SPECTACULAR VERNACULARS: HIP-HOP AND THE POLITICS OF POSTMODERNISM (1995) 9

Catherine T. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. NEGRO EDUC. 245 (1991) 12

Emmett G. Price, HIP HOP CULTURE (2006) 7

Eithne Quinn, NUTHIN' BUT A "G" THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP (2005) 13

Reagan, in South Bronx, Says Carter Broke Vow, N.Y. TIMES, Aug. 6, 1980 7

Tricia Rose, BLACK NOISE (1994) 6, 8

Tricia Rose, THE HIP HOP WARS (2008) 14

Geneva Smitherman, TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA (1977) 11

Lester K. Spence, STARE IN THE DARKNESS: THE LIMITS OF HIP-HOP AND BLACK POLITICS (2011) 21

WU-TANG CLAN, *Clan in Da Front*, on ENTER THE WU-TANG CLAN (36 CHAMBERS) (Loud Records 1993) . 10

Jay Z, DECODED (2010) 11

INTERESTS OF *AMICI CURIAE*[1]

The Marion B. Brechner First Amendment Project is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current cases and controversies affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition, and freedom of thought. The Project's director has published scholarly articles on the true threats doctrine, the subject at issue in this case, and presented a scholarly, refereed conference paper in early August 2014 regarding the intersection of true threats and rap music, which is at issue in this case.

Erik Nielson is Assistant Professor of Liberal Arts at the University of Richmond, where his research and teaching focus on hip hop culture and African American literature. He has published several peer-reviewed articles on African American music and poetry, with a particular emphasis on rap music. He frequently lectures on hip hop culture at conferences in the United States, Canada, and the United Kingdom, and his work has been featured in a wide range of major news media outlets. He also has served as an expert witness and

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[1] Pursuant to Rule of Court 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

consultant in multiple criminal cases involving rap music as evidence of alleged underlying criminal activity.

Charis E. Kubrin is Professor of Criminology, Law and Society and (by courtesy) Sociology at the University of California, Irvine. She has published widely on the intersection of music, culture, and social identity, particularly as it applies to hip hop and minority youth in disadvantaged communities. Perhaps her most important scholarly work in this area, an article titled "Gangstas, Thugs and Hustlas: Identity and the Code of the Street in Rap Music," was published in the journal *Social Problems* and has been cited more than 150 times and reprinted in four edited volumes. She has served as an expert witness and consultant in multiple criminal cases involving rap music as evidence of alleged underlying criminal activity. In 2005, she received the Ruth Shonle Cavan Young Scholar Award from the discipline's flagship organization, the American Society of Criminology.

SUMMARY OF ARGUMENT

The history and conventions of rap music, the heavily stigmatized artistic and often political genre of musical expression through which Petitioner Anthony Douglas Elonis conveyed much of the speech at issue in this case, illustrate why the Court should: a) require proof of the defendant-speaker's subjective intent to threaten under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c); and b) reverse the decision by the United States Court of Appeals for the Third Circuit in *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013).

This brief, focusing on and grounded in the work of leading rap music scholars, demonstrates the interpretative problems of meaning and understanding of rap lyrics that, unless the defendant-speaker's subjective intent is taken into account, may cause a person, particularly one unfamiliar with the genre or who holds negative stereotypes about it, to falsely and incorrectly interpret them as a threat of violence or unlawful conduct.

Rap music resides squarely within a long tradition of African American storytelling and verbal competition, one that privileges exaggeration, metaphor, and, above all, wordplay. Underlying this tradition is the practice of signifying, or the obscuring of apparent meaning; in the process of signifying, ambiguity is prized, meaning is destabilized, and gaps between the literal and the figurative are intentionally exploited. This practice, along with rap's dense slang and penchant for imbuing words with new meaning(s), makes it especially susceptible to misreading and misinterpretation. It thus is critical that the defendant-speaker's subjective intent is considered under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

Although it emerged as a voice for marginalized people who were often seeking an alternative to crime and violence, rap has, for several decades, drawn the ire and vitriol of police, politicians, religious leaders, and civic groups who maintain it is particularly threatening to American society. Indeed, research by social scientists reveals that people view rap as more dangerous and threatening when compared to other music genres. These negatively stigmatized perceptions

stem, in large part, from broader stereotypes, both about the genre itself and the primary creators of rap music – young men of color. Unless the defendant-speaker's subjective intent is taken into consideration, such biases and prejudices may subtly cause jurors and jurists to erroneously find true threats where none exist.

Yet these stereotypes ignore the importance of rap music, which not only is a global, multibillion-dollar industry, but also an influential and recognized form of artistic expression. With audiences dwarfing their traditional literary counterparts, rappers have introduced the world to a powerful new poetry – one memorized and recited by millions of people – that has given voice to communities of marginalized people and, at its best, has served as an anthem of resistance in the face of injustice.

Furthermore, the case now before the Court is far from the only recent legal dispute residing at the intersection of rap music and alleged threats. See, e.g., *United States v. Jeffries*, 692 F.3d 473, 475 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 59 (2013) (true threats case involving song written in a style that was "part country, part rap"); *Illinois v. Oduwole*, 985 N.E.2d 316, 324 (Ill. App. Ct. 2013), *appeal denied*, 2013 Ill. LEXIS 796 (Ill. May 29, 2013) (terrorist threats case involving writings that "constituted the formative stages of a rap song" by defendant with an "aspiring rap career"); *In re S.W.*, 45 A.3d 151, 153 (D.C. Cir. 2012) (threats case centering on "modified lyrics" of rap song by multi-platinum hip hop artist Lil Wayne). The problems with muddled musical meanings addressed here thus are likely to arise again in threats cases and,

in turn, necessitate consideration of the speaker-defendant's subjective intent.

With this background on rap in mind, a fundamental question illustrates a key problem with focusing only on a recipient-observer's "reasonable" perspective in the true threats analysis: What level of knowledge of rap and understanding of its complicated conventions is a defendant-speaker to assume, in advance of communication, that a hypothetically reasonable person possesses in order to properly understand a rap message? Because the answer is anything but clear and because a speaker's First Amendment rights should not hang on what amounts to guesswork about an audience's hypothetically reasonable knowledge of a complex artistic and political genre of expression, the actual subjective intent of the defendant-speaker must be considered in both the First Amendment and statutory true threats analyses.

In summary, because artistic and political genres of expression like rap, through which alleged threats ostensibly are conveyed, involve a substantial likelihood that intended meanings may be misunderstood, *amici curiae* respectfully urge the Court to require proof of a defendant-speaker's subjective intent to threaten under both the First Amendment and 18 U.S.C. § 875(c).

ARGUMENT

I. Origins of Hip Hop and Rap

In order to understand rap music, one must first understand hip hop. Hip hop is, broadly speaking, a cultural movement comprised of several artistic elements, including graffiti, break dancing, DJing, and – critically for purposes of this case and brief – rap music. See Tricia Rose, BLACK NOISE 2 (1994). Rap thus constitutes one facet – specifically, a verbal and musical one – of the larger culture of hip hop.

Hip hop evolved with political overtones, as a means through which black and Latino youth could comment on and challenge the social conditions they confronted on a daily basis – conditions driven by deindustrialization, economic restructuring, and a precipitous rise in incarceration. As a result of these social and economic shifts, the landscape of urban America deteriorated rapidly, including in places like the South Bronx, widely regarded as ground zero for hip hop.

By the 1970s, the South Bronx was a scene of utter devastation. With thousands of burnt-out, abandoned buildings, the physical landscape mirrored the hopelessness faced by its residents. They were forced to deal with the combined effects of poverty, unemployment, and isolation from mainstream America. See Jeff Chang, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 17 (2005).

By the late 1970s, conditions were so dire that President Jimmy Carter, Pope John Paul II, and Mother Teresa all made trips there to witness what had become an international symbol of urban failure.

In 1980, after then-Presidential candidate Ronald Reagan visited the area, he proclaimed not seeing "anything like this since London after the Blitz." *Reagan, in South Bronx, Says Carter Broke Vow,* N.Y. TIMES, Aug. 6, 1980, at A16.

Hip hop emerged as an expressive outlet for residents of these disadvantaged communities, a collective voice that was, in many ways, being silenced in a rapidly-changing America. Importantly, it began as (and continues to be) an agent of social and political change.

For one, it helped erode the violent gang culture that consumed places like the Bronx. Whereas gangs had long claimed territory through fighting, hip hop "posses" or "crews" (often comprised of former gang members) sought an alternative to violence. Hip hop pioneer Afrika Bambaataa, for example, once a leader of the infamous Black Spades gang, created the Universal Zulu Nation to redirect gang activity into positive social action centered around hip hop. See Emmett G. Price, HIP HOP CULTURE 12 -13 (2006).

Through Bambaataa's efforts and those of many other young men and women, street gangs lost their grip on the Bronx and, more generally, New York City. By weakening gang culture throughout the city, hip hop achieved something that police and politicians had for years failed to accomplish. This marked the beginning of a movement, one centered on positive social change, which soon spread to urban centers nationwide.

And yet, given its roots in communities marred by pervasive crime and violence, hip hop and its musical

subcomponent, rap, have long been misconstrued as extensions of urban dysfunction rather than a response to it. To an outside observer, for instance, the frenetic and aggressive maneuvers of break dancers engaged in head-to-head competitions (called "battles") can appear out of control or violent; in fact, there have been cases in which police intervened because they mistakenly believed the dancers were fighting. See Rose, *supra,* at 50.

In reality, however, the dancers are practicing a highly complex, rehearsed set of maneuvers that are anything but violent. Journalist Sally Banes, after watching a battle between rival crews in 1981, correctly observed that break dancing amounts to "ritual combat that transmutes aggression into art." Sally Banes, *Physical Graffiti: Breaking is Hard to Do*, *in* AND IT DON'T STOP 6, 9 (Raquel Cepeda ed., 2004).

Without an understanding of the history and traditions of hip hop culture, its artistic elements are vulnerable to misinterpretation. Over the last three decades, this has proven especially true for rap music.

II. The Complexity, Hyperbole, and Rhetoric of Rap: Meanings Lost in Translation

Defined as "a musical form that makes use of rhyme, rhythmic speech, and street vernacular, which is recited or loosely chanted over a musical soundtrack," (Cheryl L. Keyes, RAP MUSIC AND STREET CONSCIOUSNESS 1 (2002)), rap is what Harvard University professor Henry Louis Gates, Jr. describes as "the new vanguard of American poetry," one "born of young black and brown men and women who found their voices in rhyme, and chanted a poetic discourse to

the rhythm of the beat." Adam Bradley & Andrew DuBois, THE ANTHOLOGY OF RAP xxvi (2010).

As Gates, Jr. and many others have pointed out, rap music may have emerged from New York's burgeoning hip hop culture, but it resides within a long tradition of African American storytelling and language games that privilege parody, pastiche, and, above all, wordplay. Russell A. Potter, SPECTACULAR VERNACULARS: HIP-HOP AND THE POLITICS OF POSTMODERNISM 18 (1995).

Rap's artistic lineage is easily spotted, for example, in century-old "toasts" – long poems, orally transmitted in rhymed verse, that often are humorous, even bawdy or violent. It also is found in verbal competitions such as "the dozens," in which two opponents trade insults, often in rhyme, until a winner emerges. See Adam Bradley, BOOK OF RHYMES: THE POETICS OF HIP HOP 183 (2009). Although the insults may appear to breach the lines of healthy competition – references to violence and barbs aimed at "yo' mama" are common – the contestants and onlookers understand they are not to be taken literally.

Underlying these poems and word games is the process of signifying, or "the obscuring of apparent meaning." Henry Louis Gates, Jr., THE SIGNIFYING MONKEY 53 (1988). In the signifying tradition, ambiguity is prized, meaning is destabilized, and gaps between the literal and the figurative are intentionally exploited. As Gates, Jr. notes, the relationship between meaning and intent is therefore "skewed." Gates, Jr., *supra* at 54. An insult can be a compliment, a seeming threat just a mere joke.

Signifying lies at the heart of rap music. To the uninitiated, the lyrics at times may seem alarming, even dangerous. For example, in rap battles – competitions, reminiscent of the dozens, in which rappers verbally spar in rhymed verse – it is common to use the term "body bag" to describe an opponent's victory over an adversary (e.g., "you just got body-bagged"). Under most circumstances, the ostensible threat of being "body bagged" suggests extreme violence, but in rap battles, it becomes a metaphor that strips the phrase of any such intent.

Similarly, when GZA from the well-known group Wu-Tang Clan raps, "I'll hang your ass with this microphone" and later warns "I come sharp as a blade and I cut you slow," he is asserting his virtuosity as a lyricist rather than making literal threats of violence. WU-TANG CLAN, *Clan in Da Front* on ENTER THE WU-TANG CLAN (36 CHAMBERS) (Loud Records 1993). Recognizing this type of rhetorical flexibility is essential to interpreting rap music.

Most, if not all, art forms require some level of expertise to be fully understood. Anyone reading Geoffrey Chaucer or T.S. Eliot for the first time can attest to this fact. Yet, rap's complexities make it particularly challenging. For starters, rappers employ all the same devices as other poets, including extensive use of symbolism and metaphor; they are also highly focused on form, choosing words not only for their meanings and connotations, but also for their place in the meter and rhyme scheme of the song. BRADLEY & DUBOIS, *supra* at xxx-xxxi.

At the same time, rap music is characterized by dense slang, coded references, intentional

mispronunciations, and sometimes blazing-fast delivery, all of which defy interpretation at every turn. This often is the point in rap, as well as in black vernacular generally, which long has employed semantic inversion (reversing word meaning), neologism (inventing new words), and other devices to maintain a "black linguistic code." Geneva Smitherman, TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA 70 (1977). Speaking to this "code" in rap, Grammy-award-winning rapper Jay Z writes, "[t]he art of rap is deceptive," noting that lyrics are imbued with multiple, unresolved layers of meaning so that "great rap remains a mystery" JAY Z, DECODED 54-55 (2010). This alone makes it clear why the subjective intent of the defendant-speaker should be considered under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

Even with its inherent mystery, rap music often serves as an explicit, even confrontational, vehicle for political commentary and resistance. Rappers frequently echo, or even quote directly, pioneering authors of the Harlem Renaissance, such as Langston Hughes and Claude McKay; the influential speeches of Malcolm X, Huey P. Newton, and Martin Luther King, Jr.; the radical poetry of Black Power era artists such as Amiri Baraka and Jayne Cortez; and the innovative song-poems of Gil Scott Heron and the Last Poets. See Ernest Allen, Jr., *Message Rap*, *in* DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 159, 161 (William Eric Perkins ed., 1996). Safeguarding political speech, of course, is "central to the meaning and purpose of the First Amendment." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010)).

For many rappers, building upon the political legacy of their artistic predecessors – and broadcasting it to the masses – is an express purpose of the music. Rapper Chuck D of the group Public Enemy once described rap as "CNN for black America," while Queen Latifah, another influential rap artist, compared it to "a newspaper that people read with their ears." Catherine T. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. NEGRO EDUC. 245, 252 (1991).

While it would be misleading to extend the rap-as-journalism analogy too far, rap historically has functioned as a musical form that, through invented stories and characters, draws attention to a variety of pressing social issues, particularly those facing disadvantaged urban communities. For this reason, scholars readily acknowledge its potential to serve as a vehicle for resistance, one that is often "socially aware and consciously connected to historic patterns of political protest." Michael Eric Dyson, KNOW WHAT I MEAN? REFLECTIONS ON HIP HOP 64 (2007). As sociologist Theresa Martinez puts it, rap is "an expression of oppositional culture." Theresa Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance,* 40.2 SOC. PERSP. 265, 268 (1992).

Rap's oppositional stance became especially controversial with the emergence of "gangsta" rap, a subgenre first popularized in the late 1980s and early 1990s by West Coast artists such as Ice-T, N.W.A., and Snoop Dogg. See Murray Forman, THE 'HOOD COMES FIRST: RACE, PLACE, AND SPACE IN RAP AND HIP HOP 191 (2002).

Drawing on the rich tradition of the "bad man" in African American storytelling – a figure found in rhymed tales dating back to the nineteenth century, the urban novels of Iceberg Slim and Donald Goines, and the "blacksploitation" films of the 1970s – gangsta rappers began using their rhymes to celebrate the outlaw figure and reject traditional constructs of "legitimate" American life. See Eithne Quinn, NUTHIN' BUT A "G" THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP (2005). Their lyrics often contained graphic, highly exaggerated depictions of violence, criminal behavior, and misogyny, which were patterned after the pimps, hustlers, and gangsters found elsewhere in black and mainstream popular culture. See Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52.3 SOC. PROBS. 360 (2005).

For all its explicit and potentially offensive content, gangsta rap, along with related varieties of rap that foreground depictions of violence or criminality, has allowed young men and women of color to create a poetic universe in which they are masters of their environments. Often perceiving themselves as social outcasts and targets of institutional discrimination, they craft lyrics that give voice to the conditions in urban America that many people are not willing to confront – drug addiction, gun violence, and police brutality, to name a few – all while constructing themselves as figures of power within these precarious urban spaces. Imani Perry, PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP, 104 - 110 (2004).

Many critics have decried gangsta rap's violent, criminal themes, arguing that the music perpetuates

social ills without attempting to solve them. Yet once again, a closer look reveals a more nuanced reality than many critics recognize.

Take, for example, Tupac Shakur, one of rap's most well-known and highly respected artists. He had the words "Thug Life" tattooed across his chest, which was widely interpreted – misinterpreted, it turns out – as a sign that Shakur embraced violent gang life. In fact, one thing the tattoo signified was a complex code of ethics called "THUG LIFE," signed by members of the Bloods and Crips (rival gangs), that Shakur helped write in order to *reduce* the devastation caused by gang violence and drug addiction. Notably, acclaimed poet and university professor Nicki Giovanni now wears a "Thug Life" tattoo on her arm to honor Shakur's work. Virginia C. Fowler, NIKKI GIOVANNI: A LITERARY BIOGRAPHY 122 (2013).

While attracted to the political commentary, audiences are, no doubt, also drawn to gangsta rap's highly exaggerated, sordid tales of urban life, making it the most popular (and most profitable) subgenre of rap. Recognizing its enormous potential for commercial success, record companies long have pressured new acts to adopt gangsta-type rhetoric – a trend that continues today. Bakari Kitwana, THE RAP ON GANGSTA RAP 23 (1994).

To bolster the violent rhetoric, it is common for rappers, not unlike some well-known method actors or even professional wrestlers, to stay in character after they have left the stage, all the while acting as if they lead the lives they rap about. It is what Professor Tricia Rose calls rap's "pretense of no pretense." Tricia Rose, THE HIP HOP WARS 38 (2008). As the near-

universal adoption and use of stage names by rappers indicates, however, they live through invented characters and explore narrative voice, both on and offstage. Their preference for the first-person perspective may tempt listeners to conflate author and narrator, but as with other fictional forms, this is a mistake.

Indeed, many of the best-selling artists who have presented themselves as hardcore criminals – consider successful gangsta rapper Rick Ross, who attended college and even served as a corrections officer – are, in fact, well-educated, marketing savvy professionals. See Charis E. Kubrin & Erik Nielson, *Rap on Trial*, RACE & JUST. (2014).

Hence, when Marshall Mathers, the best-selling rapper in history, takes on the persona Eminem, one is not meant to interpret his violent, menacing lyrics (some of them aimed directly at his ex-wife, Kim Mathers) as literal reflections of intent. Mathers may push the envelope with rhetoric that, to some, is unsettling, but like other rappers, he counts on his listeners to appreciate the important distinction between an artist and his art.

In a lyric that captures the important distinction between fiction and reality in rap, Mathers, in the persona of Eminem, self-knowingly raps on the hit song "Sing For the Moment" that "[i]t's all political, if my music is literal and I'm a criminal, how the fuck could I raise a little girl? I couldn't, I wouldn't be fit to." EMINEM, *Sing for the Moment*, *on* THE EMINEM SHOW (Aftermath 2002). Mathers knows his music is not literal, of course, and that being a criminal is merely his persona. And in June 2014, about twelve years

after that song was released, Eminem's "little girl," daughter Hailie Jade Scott Mathers, graduated Summa Cum Laude from high school and thanked both her mother and father "because they have pushed me to be the person I am and have given me all the support to achieve what I have." Corinne Heller, *Eminem's Daughter, Hailie Jade Scott Mathers, 18, Graduates High School (With Honors) & Pays Tribute to Parents*, E! ONLINE NEWS, June 29, 2014, *available at* http://www.eonline.com/news/555402/eminem-s-daughter-hailie-jade-scott-mathers-18-graduates-high-school-with-honors-pays-tribute-to-parents.

Petitioner Anthony Douglas Elonis, who testified at trial that his own Facebook posts were partly inspired by Eminem, appears to be doing much the same thing with lines like these:

> Little Agent Lady stood so close
> Took all the strength I had not to turn the bitch ghost
> Pull my knife, flick my wrist, and slit her throat.
>
> (*United States v. Elonis*, 730 F.3d 321, 326 (3d Cir. 2013)).

Although offensive, these lyrics are consistent with those found in Eminem's songs and many others that derive from the gangsta rap tradition. Elonis himself declares that "[a]rt is about pushing limits," Petition for Writ of Certiorari at 10, *Elonis v. United States*, No. 13-983, 2013 U.S. Briefs 983; 2014 U.S. S. Ct. Briefs LEXIS 599 (Feb. 14, 2014). Indeed, it is evident from his lyrics that Anthony Douglas Elonis has chosen a musical genre long defined by doing just that.

As the Supreme Court of New Jersey acknowledged just this month, rap constitutes "a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture," but ultimately it is merely one of several "fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings." *New Jersey v. Skinner*, 2014 N.J. LEXIS 803, *12 (N.J. Aug. 4, 2014).

III. Fear of Rap: Another Moral Panic

As the commercial success of artists like Eminem, Jay Z, and Tupac Shakur attests, rap music is now immensely profitable and arguably constitutes the most influential musical genre of the last thirty years. During that same time period, it also has become the most controversial. Although society has embraced other forms of entertainment that contain graphic depictions of sex, violence, and criminal behavior – violent video games (protected by the Court in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011)), horror films, gangster novels, or any number of Emmy-winning shows on HBO, for instance – rap has for decades drawn the ire and vitriol of police, politicians, religious leaders, and civic groups who maintain that it especially threatens American society.

Perhaps the most illustrative example is found in the response to N.W.A.'s 1988 protest song "Fuck tha Police," which fiercely criticized discriminatory police practices in Los Angeles. See N.W.A., *Fuck tha Police*, *on* STRAIGHT OUTTA COMPTON (Ruthless Records 1988). When the song was released, Milt Ahlerich, assistant director of the FBI, was infuriated by N.W.A.'s lyrics. In an unprecedented move, he sent a

letter expressing his disgust and displeasure to N.W.A.'s label, Ruthless Records. See George Lipsitz, FOOTSTEPS IN THE DARK: THE HIDDEN HISTORIES OF POPULAR MUSIC 164 (2007).

The FBI's response triggered a reaction from police departments across the country, which worked collectively to disrupt N.W.A.'s concerts, helping to set a precedent for the frequent attempts by police, even today, to prevent rap shows in their jurisdictions. See Erik Nielson, *"Can't C Me": Surveillance and Rap Music*, 40.6 J. BLACK STUD. 1254, 1258 (2010).

Although saying "Fuck tha Police" may be offensive, the Court has recognized the importance of protecting dissenting political speech, including safeguarding a very similar phrase, "Fuck the Draft." *Cohen v. California*, 403 U.S. 15 (1971).

N.W.A.'s troubles with the law were hardly isolated incidents. In the late 1980s and early 1990s, artists across the country such as LL Cool J, Too Short, and 2 Live Crew were being arrested for performances that authorities regarded as lewd or profane. See Peter Blecha, TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS 118 (2004).

Arguably the most famous clash with law enforcement came in 1992, when rapper Ice-T formed a heavy metal group called Body Count and released a song called "Cop Killer." (An irony worth noting is that for years Ice-T has played police detective Odafin "Fin" Tutuola on the NBC show *Law & Order: Special Victims Unit*.)

Ice-T was already a polarizing figure after Tipper Gore singled him out in a 1990 op-ed in which she

depicted rap music as "dangerous" and "frightening." Tipper Gore, *Hate, Rape, and Rap*, WASH. POST, Jan. 8, 1990, at A15. When "Cop Killer" was released, it thus was not surprising that President George H.W. Bush and Vice President Dan Quayle denounced it and that police nationwide launched a campaign to force Time Warner to pull the song from store shelves, which the company eventually did. See LIPSITZ, *supra* at 167-168.

These kinds of attacks against rap have not come solely from police and politicians. In 1993, New York pastor and civil rights activist Calvin O. Butts held a high-profile demonstration in which he threatened to drive a steamroller over a pile of rap cassettes and compact discs that he claimed contained vulgar material. And for years, C. Delores Tucker, another civil rights activist, led an unrelenting campaign against gangsta rap, calling on rap artists to stop producing music with unabashedly violent and misogynistic themes. See DYSON, *supra* at 131-132.

Even today, the suspicion, fear, and anger rap provokes remain. Rap is routinely vilified in the press by critics from a variety of perspectives, either as "fake" music or as a scourge to minority communities. Journalist Jason Whitlock, articulating the latter view, argues that the image of African American men "has been destroyed by hip hop, at home and globally." See *Hip-hop on Trial,* INTELLIGENCE SQUARED AND GOOGLE+ "VERSUS" DEBATE SERIES, June 27, 2012, http://www.youtube.com/watch?v=r3-7Y0xG89Q.

Alongside such bold criticism is the continued scrutiny of law enforcement, including police task forces across the country created for the express purpose of surveilling rappers. See Erik Nielson, "*Here*

Come the Cops": Policing the Resistance in Rap Music, 15.4 INT'L J. CULTURAL STUD. 349, 350 (2011). Additionally, the last decade has witnessed an alarming increase in the use of rap lyrics as evidence in criminal proceedings, a practice that often involves de-legitimizing rap as art altogether and (mis)characterizing it as autobiography Kubrin & Nielson, *supra*; see Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007). This practice has sent dozens of young artists to jail.

Research reveals that people often view rap as more dangerous and threatening when compared to other music genres. In a 1999 experimental study, social psychologist Carrie Fried set out to explain why. She presented two groups of people with an identical set of violent lyrics, but she also removed any information that could identify the true source of those lyrics. One group was told the lyrics came from a country song, while the other was told they came from a rap song. Fried found that respondents characterized the lyrics as significantly more threatening and dangerous when they were labeled as rap rather than country. Carrie Fried, *Who's Afraid of Rap? Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999).

As Fried and others have suggested, the visceral responses that many people have to rap music stem in large part from broader racial stereotypes, especially about young men of color. These stereotypes inform people's perceptions and behaviors in a variety of settings beyond music, ranging from the justice system to the educational system and the workplace.

IV. Rap is Art, Even If It Often is Misinterpreted and Misunderstood

In a July 2013 article in *Harper's Magazine*, University of Virginia professor Mark Edmundson provocatively declared the "decline of American verse," taking contemporary poets to task for, among other things, being unambitious and unwilling to offend – and for avoiding pressing social or political issues. American poetry today, claims Edmundson, is "timid, small, in retreat." Mark Edmundson, *Poetry Slam: Or, the Decline of American Verse,* HARPER'S MAG., July 2013, at 65.

This generalization ignores the importance of rap music. Anything but "timid" or "in retreat," rap today is a cultural force, its verses filling the airwaves from New York to New Delhi, from South Korea to South Africa.

With audiences that dwarf their traditional literary counterparts, rappers have introduced the world to a powerful new poetry, memorized and recited by millions of people, that has given voice to entire communities of marginalized people, and at its best, has served as an anthem of resistance in the face of global injustice. Its visible role in uniting voters during President Barack Obama's 2008 campaign – or motivating demonstrators during the recent Arab Spring protests – are but two of many testaments to its significance and global influence. See Lester Spence, STARE IN THE DARKNESS: THE LIMITS OF HIP-HOP AND BLACK POLITICS 161-163 (2011).

Yet the tendency to discount rap music as a form of poetry persists, even as its place in the academy has

become more secure. Rap lyrics now appear in a variety of major literary anthologies, and since the early 1990s, colleges and universities have offered hundreds of classes on hip hop. Now some of the country's most elite universities – including Harvard and Cornell – have made significant institutional investments by establishing major research archives that serve as repositories of hip hop music, literature, art, and scholarship. See Travis L. Gosa, *Why Do Students Resist Hip Hop Studies?*, *in* TEACHING POLITICS BEYOND THE BOOK: FILM, TEXT, AND NEW MEDIA IN THE CLASSROOM 109 (Robert W. Glover & Daniel Tagliarina eds., 2013).

And when, in July of 2012, Cornell University announced that hip hop pioneer Afrika Bambaataa would become a visiting member of the faculty, he became one of the latest in a long line of rap artists who have taken teaching appointments at institutions of higher education.

Rap's growing relevance in academic settings is hardly surprising. Although it took shape in predominantly black and Latino communities in the late twentieth century, its artistic antecedents can be traced back centuries and across oceans. Consider, for instance, the head-to-head poetry battles of ancient Greece; the rhymed couplets of medieval French romances; or the timeless verse, teeming with newly-coined words, of William Shakespeare. In many ways, rap music is universal, part of a long tradition of expressing and commenting on the human condition.

Today, its potential is mostly keenly felt in marginalized communities. In the United States, the impact has been especially profound. A multibillion

dollar industry, hip hop has not only generated career opportunities for people who otherwise would not have had them, but it has also offered an artistic outlet for countless young people. Speaking to the possibilities that hip hop opened up, rapper Ice-T once said, "[I]f I hadn't had a chance to rap, I'd either be dead or in jail." Patrick Goldstein, *The Hard Cold Rap of Ice-T,* L.A. TIMES, Apr. 24, 1988, http://articles.latimes.com/1988-04-24/entertainment/ca-2445_1_rap-wizard.

Rapper Notorious B.I.G. echoes this sentiment when in "Things Done Changed" he raps, "If I wasn't in the rap game, I'd probably have a key knee-deep in the crack game." NOTORIOUS B.I.G., *Things Done Changed, on* READY TO DIE (Bad Boy Records 1994). After more than thirty years, it is impossible to know how many other young men and women could say the same thing, but Ice-T's and Notorious B.I.G.'s sentiments speak to the transformative, elevating potential of rap music.

It may still be difficult for some people to comprehend rap music as an art form, never mind a positive one, but time has a way of changing our perspectives. At a 2012 symposium in London, John Sutherland, emeritus professor of English at University College London, argued for rap's place in the canon, declaring that "in 20 years' time, Tupac Shakur will be ranked with Walt Whitman as a great American poet." See *Hip-Hop on Trial, supra*. Like Whitman, whose work was hugely influential and, at the same time, deeply controversial, today's rappers are changing the landscape of American poetry. Admittedly, this new poetry is not pleasing to everyone, especially those who misinterpret its sophisticated use of identity, wordplay, signifying, and exaggeration.

But since when has poetry ever been saddled with the burden of pleasing everyone? Indeed, one person's lyric may be another's vulgarity, as the Court observed in *Cohen v. California*, 403 U.S. 15, 25 (1971), but that difference in interpretation does not make it a true threat.

CONCLUSION

This brief demonstrated the multiple interpretative problems of meaning and understanding that surround rap music, the genre of expression used by Petitioner Anthony Douglas Elonis. Unless a defendant-speaker's subjective intent is taken into account, these problems may cause a juror, particularly one unfamiliar with the genre or who holds negative stereotypes about it, to falsely and incorrectly interpret rap lyrics as a threat of violence or unlawful conduct. As a result of such misinterpretation and misunderstanding, important political and artistic expression may be wrongfully squelched and punished.

Amici thus respectfully request that the Court reverse the decision below of the United States Court of Appeals for the Third Circuit and hold that proof of a defendant-speaker's subjective intent to threaten is required under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

Respectfully submitted,

Clay Calvert
Counsel of Record
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
Gainesville, FL 32611
(352) 273-1096
ccalvert@jou.ufl.edu

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

No. 13-983

In The

Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICUS CURIAE NATIONAL CENTER FOR VICTIMS OF CRIME IN SUPPORT OF RESPONDENT UNITED STATES

REBECCA J. ROE
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
Telephone: (206) 622-8000
E-Mail: roe@sgb-law.com

Counsel for Amicus Curiae
Counsel of Record

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

(1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and

(2) Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

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Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L.Ed.2d 535 (2003) 11

Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969) 11

STATE CASES

Comm. v. Gupta, 2 N.E.3d 903 (Mass. App. Ct. 2014) 10

People v. Johnson, 164 Cal. App. 4th 731 (2008) 10

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People v. Sucic, 928 N.E.2d 1231 (Ill. App. Ct. 2010) 10

State v. Becklin, 182 P.3d 944 (Wash. 2008) 10

CONSTITUTIONAL PROVISIONS & STATUTES

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STATE STATUTES

Alaska Stat. Ann. § 11.41.270(a) 8

Ariz. Rev. Stat. Ann. § 13-2923(A) 8

Ark. Code Ann. § 5-71-229(a)(1), (b)(1), (c)(1) 8

Colo. Rev. Stat. Ann. § 18-3-601 ..... 8, 9

Del. Code Ann. tit. 11, § 1312(a) 8

Ga. Code Ann. § 16-5-90(a)(1) 8

Idaho Code Ann. § 18-7906(b)(1) 8

720 ILCS 5/12-7.3(a) 8

Iowa Code Ann. § 708.11 8

La. Rev. Stat. Ann. § 14:40.2 8

Me. Rev. Stat. tit. 17-A, § 210-A 9

Mich. Comp. Laws Ann. § 750.411h(d) 9

Minn. Stat. Ann. § 609.749 9

Miss. Code Ann. § 97-3-107 9

Nev. Rev. Stat. Ann. § 200.575 9

N.H. Rev. Stat. Ann. § 633:3-a 9

N.J. Stat. Ann. § 2C:12-10 9

N.Y. Penal Law § 120.45 9

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N.D. Cent. Code Ann. § 12.1-17-07.1 9

Okla. Stat. Ann. tit. 21, § 1173 9

S.D. Codified Laws § 22-19A-1(2) 9

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Tenn. Code Ann. § 39-17-315 9

Tex. Penal Code Ann. § 42.072 9

Utah Code Ann. § 76-5-106.5 9

Va. Code Ann. § 18.2-60.3 9

Vt. Adv. Legis. Serv. 150, 2014 Vermont Laws No. 150 (S. 195) 9

Wash. Rev. Code Ann. § 9A.46.110 9

W. Va. Code Ann. § 61-2-9a 9

Wis. Stat. Ann. § 940.32 9

OTHER AUTHORITIES

Katrina Baum, Ph.D., et al., Bureau of Justice Statistics, *Stalking Victimization in the United States*, NCJ 224527 (2009) 4, 6, 7

Mary P. Bruster, *An Exploration of the Experiences and Needs of Former Intimate Stalking Victims*, Final Report Submitted to the National Institutes of Justice (1999) available at https://www.ncjrs.gov/pdffiles1/nij/grants/175475.pdf 7, 8

Shannan Catalano, Ph.D., Bureau of Justice Statistics, NCJ 224527, *Stalking Victims in the United States* – Revised, U.S. (2012) at 1, available at http://www.bjs.gov/content/pub/pdf/svus_rev.pdf 4

TABLE OF AUTHORITIES – Continued

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T.K. Logan, Ph.D., National Institute of Justice, *Research on Partner Stalking: Putting the Pieces Together* (2010) available at http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/documents/research-on-partner-stalking.pdf 6

J.G. Long, et al., *Stalking: Effective Strategies for Prosecutors*, Aequitas, Issue 11 (2002) available at http://www.aequitasresource.org/Stalking_Effective_Strategies_for_Prosecutors_Issue_11.pdf 9

T.E. McEwan, et al., *Violence in Stalking Situations*, Psychological Medicine, 39(9), 1469-1478 (2009) 4

Judith McFarlane, et al., *Stalking and Intimate Partner Femicide*, Homicide Studies, Vol. 3, No. 4, 300-316 (1999) 5

Mobilizing a Community Response to Stalking: The Philadelphia Story, Police Chief Magazine (September 2014) available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1702&issue_id=12009 8

K. Mohandie, et al., *The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*, Journal of Forensic Science 51(1) (2006): 147-155 4

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National Center for Victims of Crime, *Creating an Effective Stalking Protocol*, 10, April 2002 available at http://victimsofcrime.org/docs/src/creating-an-effective-stalking-protocol.pdf?sfvrsn=2 3

National Center for Victims of Crime, *The Model Stalking Code Revisited, Responding to the New Realities of Stalking*, January 2007, 10-13, available at http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf?sfvrsn=0 .....8, 11

Matt R. Nobels, et al., *Protection Against Pursuit: A Conceptual and Empirical Comparison of Cyberstalking and Stalking Victimization Among a National Sample*, Justice Quarterly, 31:6, 986-1014 (2012).....3, 7

Casey O'Connor, *Cutting Cyberstalking's Gordian Knot: A Simple and Unified Statutory Approach*, 43 Seton Hall L. Rev. 1007, 1032 (2013).....3

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STATEMENT OF INTEREST[1]

The National Center for Victims of Crime (National Center), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly interested in this case because of its commitment to serving victims of stalking and domestic violence. In 2000, the National Center founded the Stalking Resource Center, which serves as the official training and technical assistance provider on stalking issues for the U.S. Department of Justice, Office on Violence Against Women. The Stalking Resource Center is the leading authority on issues related to the legal application of statutes prohibiting stalking, threats, and other conduct which may place a victim or a reasonable person in fear – conduct which is distinguishable from constitutionally protected acts.

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[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENTS

The issues in this case impact laws prohibiting stalking as these laws criminalize speech and conduct (ostensibly non-criminal acts) that is part of a course of conduct and that, implicitly or explicitly, threatens the victim and instills fear for safety or of bodily harm or death.

Victims of stalking are financially, emotionally, and socially burdened by the crime regardless of the subjective intent of a speaker. A subjective intent standard gives undue protection to speech that serves no legitimate function and will erect additional barriers to reporting and prosecuting stalking.

ARGUMENTS

1. Victims Bear Significant Emotional, Financial And Social Burdens Regardless Of The Subjective Intent Of A Speaker.

Under the subjective intent test, identical words and conduct may be criminal activity or protected speech depending on the speaker's state of mind. Because the impact on the victim is the same in both instances, the subjective test does not adequately address the great burden that victims of threatening speech and conduct must bear. *United States v. Elonis*, 730 F.3d 321, 329-330 (3d Cir. 2013) (internal citations omitted) ("limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect

individuals from 'the fear of violence' and the disruption that fear engenders because it would protect speech that a reasonable speaker would understand to be threatening").

Petitioner was charged and convicted of "transmitting in interstate commerce communications containing a threat to injure the person of another." 18 U.S.C. § 875(c). This statute is commonly used to prosecute "cyberstalking." Casey O'Connor, *Cutting Cyberstalking's Gordian Knot: A Simple and Unified Statutory Approach*, 43 Seton Hall L. Rev. 1007, 1032 (2013). Cyberstalking includes the receipt of threatening communication via the internet. Matt R. Nobels, et al., *Protection Against Pursuit: A Conceptual and Empirical Comparison of Cyberstalking and Stalking Victimization Among a National Sample*, Justice Quarterly, 31:6, 986-1014 (2012). Stalking laws also criminalize "ostensibly innocent acts that would normally be considered benign and noncriminal – such as sending letters, delivering unwanted gifts, or making phone calls to the victim – if they form part of a course of conduct or that, implicitly or explicitly, threatens the victim and instills fear of bodily harm or death." National Center for Victims of Crime, *Creating an Effective Stalking Protocol*, 10, April 2002 available at http://victimsofcrime.org/docs/src/creating-an-effective-stalking-protocol.pdf?sfvrsn=2. All fifty states, the U.S. Territories, the District of Columbia, and the federal government, have stalking-related provisions in their criminal codes. *Id.* at 7.

Stalking victimization is associated with significant psychological, financial and social stress. Katrina Baum, Ph.D., et al., *Bureau of Justice Statistics, Stalking Victimization in the United States*, NCJ 224527 (2009). Victims of stalking frequently feel anxious, vulnerable, out of control, frightened, helpless, depressed and angry. *Id.* at 7. The worst fear for most victims is the uncertainty about what will happen next, followed by a fear that the behavior will never stop. *Id.* at 7. "Though perhaps counter to expectations, it appears that the sense of looming vulnerability that accompanies threats may be more productive of psychological distress in stalking victims than the reality of actual physical assault, which importantly, may precipitate a more sympathetic response, particularly from law enforcement." T.E. McEwan, et al., *Violence in Stalking Situations*, Psychological Medicine, 39(9), 1469-1478 (2009).

In addition to creating fear and anxiety, stalking is often the precursor to physical violence and homicide. Stalking behavior commonly begins or escalates after one party ends an intimate relationship. Karl Roberts, *Associated Characteristics of Stalking Following the Termination of Romantic Relationships*, Applied Psychology in Criminal Justice, 1 (2005). Intimate partner stalking appears to pose the greatest risk of interpersonal violence. Shannan Catalano, Ph.D., Bureau of Justice Statistics, NCJ 224527, *Stalking Victims in the United States* – Revised, U.S. (2012) at 1, available at http://www.bjs.gov/content/pub/pdf/svus_rev.pdf; K. Mohandie, et al., *The*

RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers, Journal of Forensic Science 51(1) (2006): 147-155. Seventy six percent of female homicide victims killed by a current or former intimate partner were stalked by their murderer prior to death. Judith McFarlane, et al., *Stalking and Intimate Partner Femicide*, Homicide Studies, Vol. 3, No. 4, 300-316 (1999). Eighty five percent of female attempted homicide victims were stalked prior to being attacked. *Id.*

Prior to her murder, one victim wrote a letter addressed to the perpetrator:

> I'm so sorry that you're still so angry and you feel a need for vengeance and punishment. You're accomplishing your goal. I feel like a walking dead person going through the motion of life. Like a small wild animal who knows it's surrounded by a pack of wolves. The smallest sound or movement makes me jump. The sound of the phone now is frightening. Another hang-up . . . I'm so locked up in my own house afraid of every sound the walls have probably always made. I walk out of my house, a coffee shop, a gym, looking. Terror. Until I get into my car and I know that the doors are locked and I can breathe again until I get out. Then it starts all over again. How long is it going to go on?

People v. Riccardi, 281 P.3d 1, 14 (Cal. 2012). Stalking victims suffer economic harm in the form of time off from work, costs associated with moving residences,

mental health treatment and legal fees. T.K. Logan, Ph.D., National Institute of Justice, *Research on Partner Stalking: Putting the Pieces Together* (2010) 12 available at http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/documents/research-on-partner-stalking.pdf. One in seven stalking victims moves as a result of being victimized. *Baum*, *supra*, at 6. One in eight stalking victims who were employed lost time from work because of fear for their safety, to obtain a restraining order, to testify in court, or to move, fix damaged property, or change their phone number. *Baum*, *supra*, at 6. Stalking victims are socially impacted when they become disconnected from their social networks as they attempt to avoid the offender. *Logan*, *supra*, at 12. Victims may avoid going out alone out of fear that they will be attacked. Stalking victims take other protective actions such as changing email accounts and other personal information, changing routines, and purchasing security systems and pepper spray.

According to one victim:

> I had my telephone number changed three times already this month. I want my children to know who their father is, so I would try . . . like when I thought that he would be calm, I tried to give him my number, allow him to have communication with his children because they would ask for him. . . . But then he starts acting like a nut again, I changed my number.

Mary P. Bruster, *An Exploration of the Experiences and Needs of Former Intimate Stalking Victims*, Final Report Submitted to the National Institutes of Justice (1999) available at https://www.ncjrs.gov/pdffiles1/nij/grants/175475.pdf.

Victims of cyberstalking, as opposed to stalking generally, take more self-protective measures, pay higher financial costs to combat the problem, and experience greater fear. *Nobels, supra*, at 1005-1010. A victim must bear these costs regardless of the defendant's subjective intent. The First Amendment should not be interpreted in a way that prevents states from protecting stalking victims against the real harm caused by threats.

2. The Subjective Intent Standard Provides Additional Barriers To Reporting And Prosecuting Stalking.

Most victims of stalking do not report the crime to law enforcement. Baum, *supra*, at 8. Victims fail to report stalking for a number of reasons. *Id.* at 14. Many victims believe that the police cannot or will not do anything to help them. *Id.* at 14. Victims also fail to report stalking because they are afraid of reprisals by the offender. *Id.* at 14. Indeed, in over 20 percent of cases, stalking behavior worsened after a victim reported the crime to the police. *Id.* at 15. When victims do report stalking to law enforcement, charges are filed in only 21 percent of cases. *Id.* at 15. According to one victim:

> If you're going to stay in the same location . . . work through the [court] system. But you'd better be prepared to give up your life, because it's a full-time job, it takes up every penny you have, and you get very little recourse. So you're putting out 90 percent of energy and you're getting back maybe 10 percent. But it's all you can do. . . .

Bruster, *supra*, at 58.

Stalking is difficult for police and prosecutors to identify, investigate and prosecute. *Mobilizing a Community Response to Stalking: The Philadelphia Story*, Police Chief Magazine (September 2014) available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1702&issue_id=12009. As a result, most State laws prohibiting stalking no longer require that the Government prove that the Defendant had the "subjective intent" to place the victim in fear. National Center for Victims of Crime, *The Model Stalking Code Revisited, Responding to the New Realities of Stalking*, January 2007, 10-13, available at http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf?sfvrsn=0. The majority of State laws prohibiting stalking use an objective or reasonable person standard. Alaska Stat. Ann. § 11.41.270(a); Ariz. Rev. Stat. Ann. § 13-2923(A); Ark. Code Ann. § 5-71-229(a)(1), (b)(1), (c)(1); Colo. Rev. Stat. Ann. § 18-3-601; Del. Code Ann. tit. 11, § 1312(a); Ga. Code Ann. § 16-5-90(a)(1); Idaho Code Ann. § 18-7906(b)(1); 720 ILCS 5/12-7.3(a); Iowa Code Ann. § 708.11; La. Rev. Stat. Ann.

§ 14:40.2; Me. Rev. Stat. tit. 17-A, § 210-A; Mich. Comp. Laws Ann. § 750.411h(d); Minn. Stat. Ann. § 609.749; Miss. Code Ann. § 97-3-107; Nev. Rev. Stat. Ann. § 200.575; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law § 120.45; N.C. Gen. Stat. Ann. § 14-277.3A; N.D. Cent. Code Ann. § 12.1-17-07.1; Okla. Stat. Ann. tit. 21, § 1173; S.D. Codified Laws § 22-19A-1(2); Tenn. Code Ann. § 39-17-315; Tex. Penal Code Ann. § 42.072; Utah Code Ann. § 76-5-106.5; Vt. Adv. Legis. Serv. 150, 2014 Vermont Laws No. 150 (S. 195); Va. Code Ann. § 18.2-60.3; Wash. Rev. Code Ann. § 9A.46.110; W. Va. Code Ann. § 61-2-9a; Wis. Stat. Ann. § 940.32.

The subjective intent standard makes it difficult to prosecute offenders because some stalkers operate without the specific intent to cause the victim fear. A stalker will maintain a strong, irrational belief that the victim will return his feelings of affection if he is persistent enough. *See* Colo. Rev. Stat. Ann. § 18-3.5-101 (2010). The subjective intent standard also makes it difficult to enforce laws prohibiting stalking because many stalkers are skilled manipulators. Stalkers "create and exploit vulnerabilities in their victims and rely on technology and their ability to manipulate the justice system in order to conceal their crimes and cast doubt on their victim." J.G. Long, et al., *Stalking: Effective Strategies for Prosecutors*, Aequitas, Issue 11 (2002) available at http://www.aequitasresource.org/Stalking_Effective_Strategies_for_Prosecutors_Issue_11.pdf. Offenders claim that

what looked like behavior reasonably calculated to make the victim afraid was just "a series of unfortunate accidents." *People v. Johnson*, 164 Cal. App. 4th 731 (2008). *See People v. Riccardi*, 281 P.3d at 15 (Defendant argued that that the encounters were "only due to coincidence because they had the same favorite restaurants and her fitness center was along his regular jogging route."); *Comm. v. Gupta*, 2 N.E.3d 903, 906 (Mass. App. Ct. 2014) (Defendant claimed coincidence when he was shopping at the same retail clothing store as his estranged wife.); *State v. Becklin*, 182 P.3d 944 (Wash. 2008) (Defendant claimed that his friends spontaneously followed the victim and reported her activities to him). Offenders also claim misunderstandings even where explicit threats are made. *People v. Sucic*, 928 N.E.2d 1231, 1238 (Ill. App. Ct. 2010) ("Defendant testified that his statement that he was going to kill himself and take [the victim] with him was 'just spiritual' and 'a figure of speech.'"). The subjective test adds an additional tool to the offender's arsenal . . . that the jury has to see into his mind. The subjective intent test will "allow carefully crafted statements by speakers who actually intend to threaten to go unpunished." Jordan Strauss, *Context is Everything: Towards a more flexible rule for evaluating true threats under the First Amendment*, 32 SW U. L. Rev. 231, 263 (2003).

In contrast, the objective standard emphasizes the importance of context in determining whether words or behavior constitute a threat.[2] Under the objective standard, the fact finder must consider the context in which the statements were made in order to determine if a reasonable speaker would understand that the words and conduct would be threatening.

> For example, if a stalker sends a dozen roses, this gesture may seem benign and loving to the casual observer. However, if that same victim has been told by her stalker numerous times that the day she receives a dozen roses is the day he is going to kill her, those same roses, understood in the context of the victim's experience, mean a very different thing. Those roses may be viewed as a direct threat to kill the victim.

National Center for Victims of Crime, *The Model Stalking Code Revisited, Responding to the New Realities of Stalking*, January 2007, 10-13, available at http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf?sfvrsn=0.

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[2] Context of speech is important to determining if it is "protected activity" or a "true threat." *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1402, 22 L.Ed.2d 664 (1969). *See Virginia v. Black*, 538 U.S. 343, 345, 123 S. Ct. 1536, 1540, 155 L.Ed.2d 535 (2003) ("The prima facie evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.").

The practical impact of a subjective intent standard will not be to protect speech, but to protect threats. A defendant, exercising his right to remain silent, can nonetheless posit a number of possible "legitimate" purposes of the communication. The prosecution cannot disprove nor even challenge any such theoretical reasons without commenting on the defendant's exercise of his Fifth Amendment right. Victims may be advised by law enforcement to communicate their feelings of being threatened in order to defeat an "I didn't know she'd think it was a threat" defense – but such communications create risk of retaliation or escalation. In fact, any contact by the victim, even negative contact, can reinforce a stalker's behavior. Conduct that is more persistent, violent, frequent or hostile will be of no value in assessing the commission of a crime because none of it will meet "the subjective intent" of the perpetrator without an admission of intent.

The government has the right "to protect through application of the criminal law the basic human need for security." *United States v. Gillenwater*, 749 F.3d 1094 (9th Cir. 2014) (affirming involuntary medication to defendant being prosecuted for threats to government officials), citing *Sell v. United States*, 559 U.S. 166, 123 S. Ct. 2174, 156 L.Ed.2d 197 (2003). The trial courts charge to the jury to consider the context of the communication, and that a true threat is to be distinguished from idle, careless joking and exaggeration, strikes the balance between the free

speech right of the speaker, and the victim's right not to live in continual fear.

CONCLUSION

Laws prohibiting stalking serve an important purpose. Victims are harmed by stalking behavior regardless of the subjective intent of the offender. The subjective intent standard provides yet another hurdle to reporting and prosecuting stalking offenses.

Respectfully submitted,

REBECCA J. ROE
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
Telephone: (206) 622-8000

Counsel for Amicus Curiae
Counsel of Record

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, ET AL. IN SUPPORT OF RESPONDENT

[Additional *Amici* Listed On Inside Cover]

PAULETTE SULLIVAN MOORE
NATIONAL NETWORK TO END DOMESTIC VIOLENCE
1400 16th Street, N.W.
Suite 330
Washington, DC 20036
(202) 543-5566

HELEN GEROSTATHOS GUYTON
Counsel of Record
SANDRA J. BADIN
TIMOTHY J. SLATTERY
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, DC 20004
(202) 434-7300
hgguyton@mintz.com

Counsel for Amici

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

Additional *Amici Curiae*

Arizona Coalition to End Sexual and Domestic Violence, California Partnership to End Domestic Violence, Colorado Coalition Against Domestic Violence, Delaware Coalition Against Domestic Violence, Georgia Coalition Against Domestic Violence, Guam Coalition Against Sexual Assault & Family Violence, Hawaii State Coalition Against Domestic Violence, Illinois Coalition Against Domestic Violence, Indiana Coalition Against Domestic Violence, Inc., Jane Doe Inc., Kansas Coalition Against Sexual and Domestic Violence, Maine Coalition to End Domestic Violence, Missouri Coalition Against Domestic and Sexual Violence, Montana Coalition Against Domestic and Sexual Violence, Nevada Network Against Domestic Violence, New Hampshire Coalition Against Domestic and Sexual Violence, New Jersey Coalition for Battered Women, New Mexico Coalition Against Domestic Violence, New York State Coalition Against Domestic Violence, Ohio Domestic Violence Network, Pennsylvania Coalition Against Domestic Violence, Rhode Island Coalition Against Domestic Violence, South Carolina Coalition Against Domestic Violence and Sexual Assault, Vermont Network Against Domestic and Sexual Violence, Virginia Sexual and Domestic Violence Action Alliance, Washington State Coalition Against Domestic Violence, West Virginia Coalition Against Domestic Violence, End Domestic Abuse WI: the Wisconsin Coalition Against Domestic Violence, Inc., Wyoming Coalition Against Domestic Violence and Sexual Assault

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TABLE OF AUTHORITIES

CASES Page(s)

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 17

United States v. Castagana,
604 F.3d 1160 (9th Cir. 2010) 18

United States v. Elonis,
730 F.3d 321 (3d Cir. 2013)..... 22

United States v. Jeffries,
692 F.3d 473 (6th Cir. 2012) 22, 24

United States v. Mabie,
663 F.3d 322 (8th Cir. 2011) 17, 23

United States v. Manning,
923 F.2d 83 (8th Cir. 1991) 17

United States v. Martinez,
736 F.3d 981 (11th Cir. 2013) 22

United States v. Prochaska,
222 F.2d 1 (7th Cir. 1955) 18

United States v. Stewart,
411 F.3d 825 (7th Cir. 2005) 23

United States v. White,
2010 U.S. Dist. LEXIS 9603
(W.D. Va. Feb. 4, 2010) 17

United States v. White,
670 F.3d 498 (4th Cir. 2012) 22

Virginia v. Black,
538 U.S. 343 (2003) 16, 21

Watts v. United States,
394 U.S. 705 (1969) 23, 24

TABLE OF AUTHORITIES—Continued

CONSTITUTION & STATUTES Page(s)

U.S. Const. amend. I ..... *passim*

18 U.S.C. §875(c) ..... *passim*

OTHER AUTHORITIES

Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552 (2007) 7

Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 Tex. J. Women & L. 131 (2011) 10, 12

Anne L. Ganley, *Understanding Domestic Violence, in Improving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* 14, 18-24 (2d ed. 1996), available at http://www.futureswithoutviolence.org/userfiles/file/HealthCare/improving_healthcare_manual_1.pdf (last visited Oct. 1, 2014) 8

Beth Bjerregaard, *An Empirical Study of Stalking Victimization, Violence and Victims*, Vol. 15, No. 4 (2000) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Craig Timberg and Matt Zapotosky, *Maker of StealthGenie, an app used for spying, is indicted in Virginia*, The Washington Post, Sept. 29, 2014, *available at* http://www.washingtonpost.com/business/technology/make-of-app-used-for-spying-indicted-in-virginia/2014/09/29/816b45b8-4805-11e4-a046-120a8a855cca_story.html (last visited Oct. 2, 2014) 15

Cynthia Fraser, et al., *The New Age of Stalking: Technical Implications for Stalking*, Juv. & Fam. Ct. 61, no. 4 (Fall 2010) 7, 12, 15, 16

Dante D'Orazio, *Gmail Now Has 425 Million Total Users*, The Verge, June 28, 2012, *available at* http://www.theverge.com/2012/6/28/3123643/gmail-425-million-total-users (last visited Oct. 1, 2014) 12

Department of Justice, *Pakistani Man Indicted for Selling 'StealthGenie' Spyware App*, *available at* http://www.justice.gov/opa/pr/pakistani-man-indicted-selling-stealthgenie-spyware-app (last visited Oct. 2, 2014) 15

Desmond Upton Patton et al., *Social Medial as a Vector for Youth Violence: A Review of the Literature*, 35 Computers in Hum. Behav. 548-553 (2014) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Domestic Violence, U.S. Dep't of Justice, Office on Violence Against Women, http://www.ovw.usdoj.gov/domviolence.htm (last visited Oct. 1, 2014) 8

Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007) 7-8

Evan Stark, *Re-Representing Woman Battering: From Battered Woman's Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995) 8

Facebook Help Center, Sharing, *available at* https://www.facebook.com/help/www/418076994900119 (last visited Sept. 29, 2014) ... 14

Facebook, Inc., Quarterly Report (Form 10-Q) (July 24, 2014) 12

Frederick Schauer, *Intentions, Conventions, and The First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 220 18

International Telecommunication Union, The World in 2014: ICT Facts and Figures (May 5, 2014), *available at* http://www.itu.int/en/ITUD/Statistics/Documents/facts/ICTFactsFigures2014-e.pdf 12

Karl Roberts, *Women's Experience of Violence During Stalking by Former Romantic Partners: Factors Predictive of Stalking Violence*, Violence Against Women, Vol. 11, No. 89 (2005) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Katrina Baum et al., *Stalking Victimization in the United States,* Bureau of Justice Statistics Special Report, National Crime Victimization Survey (Jan. 2009) 10

Kris Mohandie et al., *The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*, J. Forensic Sci., Jan. 2006, Vol. 51, No. 1 9

Location Privacy Protection Act of 2014: Hearing on S. 2171 Before the Subcomm. on Privacy, Technology, and the Law of the S. Comm. on the Judiciary, 113th Cong. (June 4, 2014)..... 7, 11, 13, 15

Lorraine Sheridan & Karl Roberts, *Key Questions to Consider in Stalking Cases*, Behav. Sci. Law 29:255-270 (2011)..... 9, 10, 19

Mario J. Scalora, *Electronic Threats and Harassment (2014) in International Handbook of Threat Assessment*, Chapter 13 (J. Reid Meloy & Jens Hoffman, eds.) (2014) ... 9

Mary P. Brewster, *Stalking by Former Intimates: Verbal Threats and Other Predictors of Physical Violence, Violence and Victims*, Vol. 15, No. 1 (2000) 9

Michele C. Black et al., Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 37 (Nov. 2011)..... 8

TABLE OF AUTHORITIES—Continued

Page(s)

NNEDV Survey (2012), *available at* http://techsafety.org/blog/2014/4/29/new-survey-technology-abuse-experiences-of-survivors-and-victim-services (last visited Oct. 1, 2014) 14

Patricia Tjaden and Nancy Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, U.S. Department of Justice, National Institute of Justice and Centers for Disease Control and Prevention (Apr. 1998), available at https://www.ncjrs.gov/pdffiles/169592.pdf (last visited Oct. 1, 2014) 10

Shannan Catalano, *Stalking Victims in the United States—Revised*, Bureau of Justice Statistics Special Report, National Crime Victimization Survey (September 2012)..... 10

TK Logan & Robert Walker, *Toward a Deeper Understanding of the Harms Caused by Partner Stalking*, Violence and Victims, Vol. 25, No. 4 (2010) 10, 11

World to Have More Cell Phone Accounts Than People by 2014, Silicon India, Jan. 2, 2013, *available at* http://www.siliconindia.com/magazine_articles/World_to_have_more_cell_phone_accounts_than_people_by_2014-DASD767476836.html (last visited Oct. 1, 2014)..... 12

INTEREST OF *AMICI CURIAE* [1]

Amici include numerous non-profit organizations devoted to remedying domestic violence through legal, legislative, and policy initiatives, as well as organizations providing advocacy and legal and counseling services to survivors of domestic violence. *Amici* collectively have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence. *Amici* also represent clients that are threatened and stalked through the use of technology, including social media.

Amici are deeply concerned that interpreting Section 875(c) to require proof of a subjective intent to threaten will make it more difficult to protect victims of abuse from threats of violence made by their current and former intimate partners, who increasingly use easily accessible but sophisticated technology to track their victims and to threaten them wherever they are, even after they manage to escape their abusers, and from the crippling fear and disruption such threats cause. For these reasons *Amici* are submitting this brief in support of Respondent.

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[1] No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. The identities and interests of the individual *Amici* are described in the Appendix to this brief.

SUMMARY OF ARGUMENT

This case is not about political speech. It is not about ideological, religious, or social speech. It is not even about distasteful or offensive speech. This case is just about threatening speech—words that threaten violence.

Threats of violence are hallmarks of intimate partner violence, and are used by perpetrators to gain and maintain power over their victims. Advances in technology give perpetrators of intimate partner violence an ever-increasing array of tools to threaten their victims, and to continue to threaten them even after they manage to escape their abusive partners. Advances in technology also provide perpetrators with ever-more sophisticated tools to track their victims' movements, making their threats that much more potent and credible.

Threats of violence have never enjoyed First Amendment protection, and for good reason: threats cause fear and they force victims to change their lives, sometimes quite drastically. This is particularly true in the context of intimate partner violence. As this Court has long recognized, the government has a compelling interest in protecting people from such harm.

The harm caused by threats of violence does not depend on the subjective intent of the person making the threats; it depends on the content of the threats and on the context in which they are delivered. Just as a cry of "fire" in a crowded theater will cause the same panic whether the speaker intended only a prank or actually intended to cause fear, so too with threats of violence. An objectively threatening message will predictably cause fear and disruption

regardless of whether the speaker actually intended to threaten, or intended only to harass or annoy, or simply had no regard for how its recipient might react.

A standard that requires proof of the speaker's subjective intent—what he "really" intended in his heart of hearts—for conviction of threatening another person would fail to protect victims of intimate partner violence and stalking from the real and predictable harm caused by the threats of violence they face daily.

The objective, reasonable person standard strikes the appropriate balance: it protects victims from threats of violence, and from the fear and disruption such threats cause, while at the same time ensuring that First Amendment boundaries are not transgressed. By focusing the inquiry on whether a reasonable person would understand a given statement as expressing a serious intention to injure another person, the objective standard reaches only true threats, not idle or careless talk, exaggeration, or statements made in jest. It reaches only speech that a reasonable person would, in light of the speech's content and the context in which it was delivered, regard as conveying a threat to injure or kill. As such, it protects victims of intimate partner violence and stalking from the fear and disruption caused by objectively threatening speech, without chilling, much less criminalizing any protected speech.

ARGUMENT

I. TECHNOLOGY HAS GIVEN PERPETRATORS OF DOMESTIC VIOLENCE EVER MORE SOPHISTICATED AND POTENT TOOLS TO THREATEN THEIR VICTIMS.

A. Women Across the United States Are Being Threatened By Perpetrators Who Misuse Social Media and Other Online Technologies; the Consequences are Deeply Damaging.

In every jurisdiction across the country, *Amici* have seen the victims they represent suffer the devastating psychological and economic effects of threats of violence, which their abusers deliver more and more often via social media. These threats are not artistic expression. They are not performance art or fantasy violence. They are a key part of the in-person abuse to which the victims have been subjected, sometimes for years, and from which they have tried desperately to escape. And they have very real and very damaging consequences on the victims' daily lives. Their stories are chilling. Here are just a few:

- In Arizona, one victim moved 9 times in an 18 month period, changed phone numbers and providers multiple times, changed employers 4 times, and moved 2,000 miles away from her abuser after he repeatedly threatened her on social networking sites including Facebook and Twitter, created pages and profiles using pseudonyms designed to harass and intimidate her, and created false Facebook profiles of her

loved ones in a further effort to control her and place her in fear.[2]

- In Illinois, another victim felt terrorized and fearful after her abuser posted publicly on Facebook pictures of her, her house, and their children from a distance with captions such as, "You think you can hide from me?" and thinly veiled death threats that soon he would have custody of the children because their mother would be "*no more*." Her abuser also created fake accounts with her name and friended her friends and family using these fake profiles.[3]

- In Pennsylvania, a woman described being unable to sleep and eat and feeling extremely frightened and anxious upon seeing her abuser's Facebook page where he publicly announced that he planned to hogtie her, put her in a trunk, pull out her teeth one by one, then pull off her finger and toe nails, and chop her into pieces, but keep her alive long enough to feel all the hurt and pain.[4]

- Elsewhere in Pennsylvania, another woman described feeling harassed, terrorized, and threatened by her abuser after he publicly posted a series of threats

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[2] Statement provided by *Amicus* Arizona Coalition Against Domestic Violence on September 19, 2014.

[3] Statement provided by *Amicus* Illinois Coalition Against Domestic Violence on September 19, 2014.

[4] Statement provided by the Law Offices of Women in Need, Pennsylvania, on September 19, 2014.

against her on Tumblr and Facebook, including the following statement after she obtained a protective order against him: *"You stupid fucking cunt you will never get away with this, I don't care if I have to wait years, I will always remember what you did to me—no one fucks me over and gets away with it. EVER. And you will NOT be the first."*[5]

- In Colorado, one victim described checking her ex's Facebook page daily to see where he was, what he was doing, and what he was posting after he threatened her and used the site to post a fairly large reward to anyone who told him where she was staying. When he posted his intentions to fly to her state, she told the police and an officer followed him from the airport to her residence where he was arrested for violation of the protection order and later, for cyberstalking.[6]
- In New York, after experiencing continued threats on her Facebook page from her ex-boyfriend and his family, one women described being hyper-vigilant and fearful, particularly after her abuser tagged her baby's picture on Facebook and made threatening statements.[7]

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[5] Statement provided by A Woman's Place Legal Assistance Program, Pennsylvania, on September 22, 2014.

[6] Statement provided by *Amicus* Colorado Coalition Against Domestic Violence on September 19, 2014.

[7] Statement provided by the NYC Housing and Veterans Initiatives, New York, on September 23, 2014.

- In Guam, victims reported feeling afraid, anxious, scared, and humiliated by threatening Facebook posts made by their abusers, and several victims recently moved to domestic violence shelters because of that fear.[8]

These victims, and thousands more like them, have experienced real-life terror caused by increasingly graphic and public posts to Facebook and other social media sites—terror that is exacerbated precisely because abusers now harness the power of technology, "enabling them to reach their victims' everyday lives"[9] at the click of a mouse or the touch of a screen.

B. Threats of Violence Have Always Been an Integral Part of Domestic Violence, and Often Precede Physical Violence.

Domestic violence is an epidemic that claims 7 million new victims every year across all age, race, and socioeconomic groups.[10] At its core, "domestic violence is about gaining control of another person."[11] It is an

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[8] Summaries of recent cases involving social media threats against their clients provided by *Amicus* Guam Coalition Against Sexual Assault & Family Violence on September 18, 2014.

[9] Cynthia Fraser, et al., *The New Age of Stalking: Technical Implications for Stalking*, Juv. & Fam. Ct. 61, no. 4 (Fall 2010), at 1.

[10] *Location Privacy Protection Act of 2014: Hearing on S. 2171 Before the Subcomm. on Privacy, Technology, and the Law of the S. Comm. on the Judiciary*, 113th Cong. (June 4, 2014) (herein, "*Location Privacy Protection Act of 2014 Hearing*") (testimony of Cindy Southworth, Vice President of Development and Innovation, National Network to End Domestic Violence).

[11] Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007); *see* Evan Stark, *Coercive Control: How Men*

"ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's [or man's] life, including sexuality; material necessities; relations with families, children, and friends; and work."[12] The reality of domestic violence may include such conduct as verbal threats directed at the victim herself or at her family, children and friends; stalking behaviors, including cyberstalking, which involves the use of the Internet or other electronic means to stalk or harass an individual; excessive monitoring of a woman's movements and activities, repeated accusations of infidelity, and various actions aimed at controlling with whom she has contact.[13]

Entrap Women in Personal Life 5 (2007) (hereinafter, "Stark, *Coercive Control*") (articulating "coercive control" theory of domestic violence, which frames "woman battering . . . as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control").

[12] Evan Stark, *Re-Representing Woman Battering: From Battered Woman's Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995); *see also Domestic Violence*, U.S. Dep't of Justice, Office on Violence Against Women, http://www.ovw.usdoj.gov/domviolence.htm (last visited Oct. 1, 2014) (hereinafter, "USDOJ Office on Violence Against Women") (defining "domestic violence" as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner").

[13] *See* Anne L. Ganley, *Understanding Domestic Violence*, in *Improving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* 14, 18-24 (2d ed. 1996), *available at* http://www.futureswithoutviolence.org/userfiles/file/HealthCare/improving_healthcare_manual_1.pdf (last visited Oct. 1, 2014); *see also* Michele C. Black et al., Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 37 (Nov. 2011) (measuring broad

Threats and stalking behaviors are not just terrifying in themselves; they are also frightening because they are reliable predictors of physical violence. The incidence of threats is strongly correlated with the likelihood of physical violence.[14] Indeed, direct threats of violence lead to significant physical violence for more than half of victims.[15] Researchers have also found that "leakage"—a perpetrator's communications with third parties expressing an intent to harm the victim—is a leading indicator of escalation from threats to physical violence.[16, 17]

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range of conduct in national survey on prevalence of intimate partner violence).

[14] Lorraine Sheridan & Karl Roberts, *Key Questions to Consider in Stalking Cases*, Behav. Sci. Law 29:255-270 (2011) (finding that threats of physical assault are a reliable and statistically significant predictor of serious domestic violence, "specific written or verbal threats . . . should be taken particularly seriously"); Kris Mohandie et al., *The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*, J. Forensic Sci., Jan. 2006, Vol. 51, No. 1 (stating that threats of physical violence are strong indicators of forthcoming physical violence); Mary P. Brewster, *Stalking by Former Intimates: Verbal Threats and Other Predictors of Physical Violence*, Violence and Victims, Vol. 15, No. 1 (2000) ("[W]hen verbal threats occurred, the likelihood of violence occurring significantly increased." and "Threats of violence were significantly correlated with actual physical violence in every model.").

[15] *See* Brewster, *supra* note 14.

[16] Mario J. Scalora, *Electronic Threats and Harassment* (2014) in International Handbook of Threat Assessment, Chapter 13 (J. Reid Meloy & Jens Hoffman, eds.) (2014).

[17] In fact, one in three women will be assaulted by an intimate partner in her lifetime—that is over 50 million women alive in the United States today. *See* Brewster, *supra* note 14. One in 12 women will be stalked by an intimate partner in her lifetime. *See*

It is not surprising, then, that nearly half of intimate partner stalking victims report that their worst fear is "not knowing what would happen next"—a crippling terror that damages a victim's ability to sleep, eat, and work, let alone thrive.[18] These women change jobs, uproot themselves, avoid contact with family and friends who know their abusers, and

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TK Logan & Robert Walker, *Toward a Deeper Understanding of the Harms Caused by Partner Stalking*, Violence and Victims, Vol. 25, No. 4 (2010). Among stalking victims, about 63% will face direct threats from their stalker and almost 30% will suffer some form of physical violence. *See* Sheridan & Roberts, *supra* note 14 at 29:255-270 (29.3% of stalking victims are physically assaulted, and of those assaulted, 29.6% required hospital or emergency room treatment for their resulting injuries); Karl Roberts, *Women's Experience of Violence During Stalking by Former Romantic Partners: Factors Predictive of Stalking Violence*, Violence Against Women, Vol. 11, No. 89 (2005). Women stalked by former husbands are at an even higher risk: 81% risk have been physically assaulted and 31% have been sexually assaulted. *See* Patricia Tjaden and Nancy Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, U.S. Department of Justice, National Institute of Justice and Centers for Disease Control and Prevention (Apr. 1998), *available at* https://www.ncjrs.gov/pdffiles/169592.pdf (last visited Oct. 1, 2014). And 76% of all women killed by intimate partners had been previously stalked by that partner. *See* Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 Tex. J. Women & L. 131 (2011). Some reports suggest that this number could be as high as 90 percent. *See, e.g.*, Beth Bjerregaard, *An Empirical Study of Stalking Victimization*, Violence and Victims, Vol. 15, No. 4 (2000).

[18] Katrina Baum et al., *Stalking Victimization in the United States*, Bureau of Justice Statistics Special Report, National Crime Victimization Survey (Jan. 2009); *see also* Shannan Catalano, *Stalking Victims in the United States–Revised*, Bureau of Justice Statistics Special Report, National Crime Victimization Survey (Sept. 2012) (updating 2009 report).

isolate themselves in response to the invasive and threatening actions of their abusers. They also suffer from high global stress scores, which measure the degree to which a person appraises situations in her life as stressful, high rates of post-traumatic stress disorder, continuing fear of ongoing harassment, physical injury, and public humiliation,[19] and high rates of anxiety and depression.[20]

The impact is not only psychological and emotional, but also economic. More than half of victims reported losing at least one week of work and about 130,000 reported being fired or asked to leave their positions because stalking had affected their work.[21] From the perspective of the national economy, the lost productivity is enormous; from the perspective of the individual victim who is desperately trying to escape her abuser, the lost financial stability is crippling.

C. Current Technologies Give Abusers Sophisticated Tools to Threaten Violence in Ever More Potent and Far-Reaching Ways.

The Internet has given stalkers and abusers "more tools and a wider audience, which makes it more

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[19] This includes incidents where the abuser creates mock public social media profiles of the victim and posts inappropriate or lewd comments or pictures, typically sexual in nature, and poses as the victim on social media, disrupting the victim's communications and relationships with family and friends and further isolating the victim.

[20] *See* Logan & Walker, *supra* note 17.

[21] *Location Privacy Protection Act of 2014 Hearing*, *supra* note 10 (testimony of Cindy Southworth, Vice President of Development and Innovation, National Network to End Domestic Violence).

dangerous for victims."[22] In particular, these perpetrators are increasingly posting to social media with descriptions of what they intend to do to their victims and disclosures of personal, damaging, or humiliating information or pictures of them.[23]

This is not a surprising development. A new generation is growing up on digital communication. Facebook boasts 1.3 billion users;[24] Gmail, one of the web's most popular e-mail services, has over 425 million active users;[25] and the number of active mobile phones may exceed the world's population by the end of 2014.[26] Young women ages 18-24 are experiencing electronic stalking through e-mail, text messaging, and social media at levels well beyond any other

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[22] Fraser, *supra* note 9.

[23] *Id.* *See also* King-Ries, *supra* note 17 ("An entire generation is normalizing 'boundarylessness' and incorporating technology use into their relationships. Additionally, a greater use of technology in engaging in intimate relationships means greater risk of being cyberstalked as adults.").

[24] Facebook, Inc., Quarterly Report (Form 10-Q), at 21 (July 24, 2014).

[25] Dante D'Orazio, *Gmail Now Has 425 Million Total Users*, The Verge, June 28, 2012, *available at* http://www.theverge.com/2012/6/28/3123643/gmail-425-million-total-users (last visited Oct. 1, 2014).

[26] *World to Have More Cell Phone Accounts Than People by 2014*, Silicon India, Jan. 2, 2013, *available at* http://www.siliconindia.com/magazine_articles/World_to_have_more_cell_phone_accounts_than_people_by_2014-DASD767476836.html (last visited Oct. 1, 2014). *See also* International Telecommunication Union, The World in 2014: ICT Facts and Figures (May 5, 2014), *available at* http://www.itu.int/en/ITUD/Statistics/Documents/facts/ICTFactsFigures2014-e.pdf.

demographic group.[27] The exponential growth of technology and its impact on the way we communicate will only increase the incidence of "high-tech" stalking as more digitally-native generations mature.[28]

Social media have become a dominant feature of the new technological landscape. Social networks are a way to stay in touch and share life's moments with others. Facebook, for instance, allows its users to connect, communicate, and share media with one another. Facebook users can become "friends" with other users, a relationship that grants additional access to each other's profiles, photos, and postings. When posting a message, link, video, or photo to Facebook, a user has the option to limit who can see the post by only sharing it with friends or a select group of friends, but the Facebook default is to share that post with all 1.3 billion active users. Logging on to Facebook brings the user to her News Feed, a constantly-updating collection of stories chronicling friends' activities, such as pictures of their vacation, thoughts on the most recent political scandal, or a map showing where some friends had dinner last night.

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[27] *Location Privacy Protection Act of 2014 Hearing, supra* note 10 (testimony of Bea Hanson, Principal Deputy Director, Office on Violence Against Women, Department of Justice). Youth violence is also increasingly occurring on social media with about 20% of youth in 2010 reportedly experiencing cyberbullying. *See, e.g.*, Desmond Upton Patton et al., *Social Medial as a Vector for Youth Violence: A Review of the Literature*, 35 Computers in Hum. Behav. 548-553 (2014). Patton et al. also note that adolescents who made online threats of school massacres were more likely to have made preparations to carry out those acts than adolescents who made in-person threats.

[28] *Location Privacy Protection Act of 2014 Hearing, supra* note 10 (testimony of Bea Hanson, Principal Deputy Director, Office on Violence Against Women, Department of Justice).

Facebook posts that are not directly sent to a victim will often find their target. If a friend of the victim comments on the abuser's post, that comment (and, thus, the post) is likely to show up on the victim's News Feed. A victim, then, could see her abuser's posts not just directly but also through a mutual friend's comments or activity.[29] And, if the post is public, a victim can access it, as can her friends, coworkers and family, and any other Facebook user.

In a survey of victim service agencies conducted by NNEDV in 2012, almost ninety percent of the 759 agencies reported that victims had been intimidated or threatened via technology.[30] Threatening text messages were used more than half of the time, Facebook and social media were used at least one-third of the time, and e-mail was used a quarter of the time.[31] The immediacy of new communication

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[29] Facebook Help Center, Sharing, *available at* https://www.facebook.com/help/www/418076994900119 (last visited September 29, 2014).

[30] Fifty-five of the fifty-six states and several U.S. territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands) participated in the survey. The agencies surveyed included Dual Domestic Violence/Sexual Assault Programs: 350 (46%), Domestic Violence Programs: 328 (43%), Sexual Assault Programs: 27 (4%), Programs that help victims of all crimes, including DV/SA/ Trafficking/Stalking: 22 (3%), and Other (including government, LE, attorney, prosecutor offices, housing): 32 (4%). "Technology Abuse in Intimate Partner Violence," NNEDV Survey (2012), *available at* http://techsafety.org/blog/2014/4/29/new-survey-technology-abuse-experiences-of-survivors-and-victim-services (last visited Oct. 1, 2014).

[31] *Id.* These percentages add up to more than 100% because many victims were threatened via multiple forms of technology. Half of the agencies also reported that victims requested assistance with safety on social media, almost seventy percent reported that perpetrators had posted pictures of the victim

methods has reduced the cost and effort required for abusers to escalate their actions from internal thoughts to verbal threats and physical assaults. Emotional impulses that in the past were often tempered by distance and time can now immediately be turned into easily-communicated threats.

Contemporary technology also makes stalking easier. Once, stalking required an almost obsessive effort from perpetrators to call, drive by, follow, and track their victims incessantly. Today, there are a variety of applications that allow stalkers to track their victims' movements.[32] Increasingly, perpetrators are turning to mobile applications and social media sites to infiltrate every aspect of their victims' lives.

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online or on social media without consent, and almost three quarters reported abusers had created mock social media profiles impersonating the victim, or had accessed the victim's social media account or e-mail. *Id.*

[32] *Location Privacy Protection Act of 2014 Hearing, supra* note 10 (opening statement of Chairman Franken) (describing mobile applications designed for spying on spouses, including FlexiSPY and quoting its marketing materials: "FlexiSPY gives you total control of your partner's phone without them knowing it . See exactly where they are, or were, at any given date and time."); Fraser, *supra* note 9. *See also* Department of Justice, *Pakistani Man Indicted for Selling 'StealthGenie' Spyware App, available at* http://www.justice.gov/opa/pr/pakistani-man-indicted-selling-stealthgenie-spyware-app (last visited Oct. 2, 2014) (describing "StealthGenie" mobile application that allows users to spy on and to track their intimate partners without their partners' knowledge or consent); Craig Timberg and Matt Zapotosky, *Maker of StealthGenie, an app used for spying, is indicted in Virginia*, The Washington Post, Sept. 29, 2014, *available at* http://www.washingtonpost.com/business/technology/make-of-app-used-for-spying-indicted-in-virginia/2014/09/29/816b45b8-4805-11e4-a046-120a8a855cca_story.html (last visited Oct. 2, 2014) (same).

With a few taps, an abuser can listen in on all calls, read all text messages, track location in real-time, and even remotely activate the mobile device's camera—all from the couch, the office, or while waiting for the morning train. Using this information, abusers are tailoring their threats to include specific details to signal they know where their victims are and what they are doing at all times, and even arriving at their victims' locations unannounced. These types of advanced threats instill in victims a deep and abiding fear of what their abusers will do next and prevent them from living normal, healthy lives.[33]

II. REQUIRING PROOF OF SUBJECTIVE INTENT WILL UNDERMINE THE CENTRAL PURPOSE OF PROHIBITING THREATS OF VIOLENCE.

It is well settled that the government may proscribe true threats of violence without regard to whether the speaker actually intends to carry them out. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003). This is because threats of violence are, in themselves, harmful—they cause fear and all its attendant damaging and disruptive psychological, emotional, and physical effects. And, as this Court reaffirmed in *Black*, the government has a compelling interest in protecting people from such fear and disruption, and not just from the possibility that the threatened violence will occur. *Id.* at 360 (citing *R.A.V. v. City of St. Paul*, 505 U.S., 377, 388 (1992)).

For the same reason—because threats of violence cause fear and disruption regardless of the speaker's actual motivation in making them—proof of subjective intent should not be required for conviction of

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[33] Fraser, *supra* note 9.

threatening under Section 875(c). Particularly with respect to intimate partner violence and stalking, proscribing only those statements in which the speaker subjectively intended to convey a threat will be "dangerously underinclusive" with respect to the principal rationale of protecting individuals from the harm caused by threats of violence, and will undermine the central purpose of prohibiting threats in the first instance. *United States v. Mabie*, 663 F.3d 322, 333 (8th Cir. 2011) (quoting *New York v. Cain*, 418 F. Supp. 2d 457, 479 (S.D.N.Y. 2006)); *cf. United States v. White*, 2010 U.S. Dist. LEXIS 9603, at *27 (W.D. Va. Feb. 4, 2010) ("If the prohibition on true threats is meant to protect listeners from the 'fear of violence' and the corresponding 'disruption that fear engenders,' then the subjective intent of the speaker cannot be of paramount importance.") (quoting *Black*, 538 U.S. at 360), *aff'd*, 670 F.3d 498 (4th Cir. 2012).

A. The Harm Caused By Threats of Violence Depends on Their Content And The Context In Which They are Made, Not On The Speaker's Subjective Intent.

Like fighting words, true threats of violence are words that "by their very utterance inflict injury." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). They do so simply by virtue of their threatening character, *i.e.*, because the expressions *convey* an intention to cause bodily harm or death, thereby naturally creating in their recipients a sense of fear and disturbing their sense of security. *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991) ("The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the gravamen of the offense.").

The fear and disruption caused by threats of violence do not derive from the speaker's private motivation—whether he actually *intended* to convey a threat, or intended just to have a bit of fun or to vent his frustration. A statement that a reasonable person would interpret as a threat to hurt or to kill causes fear and disruption regardless of the speaker's motivation. *Cf. United States v. Castagana*, 604 F.3d 1160, 1164 (9th Cir. 2010) ("Even if a perpetrator does not intend that his false information be believed as indicative of terrorist activity, the false information will nevertheless drain substantial resources and cause mental anguish when it is objectively credible."). This is just a function of the way language works. "[W]ords or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published," *United States v. Prochaska*, 222 F.2d 1, 2 (7th Cir. 1955), and not from the speaker's personal reasons for using them in the way that he did.

Of course, this is not to say that the speaker's intent is divorced from his audience's interpretation of what he meant to convey, for "it will usually be the case that a person intends the ordinary meaning and natural consequences of the words he uses." Frederick Schauer, *Intentions, Conventions, and The First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 220. Were it otherwise, communication would be very difficult, if not impossible. But a speaker's private reasons for expressing himself in the way that he did—whether he really meant to convey a threat or instead had other undisclosed reasons for making the statement in question—are never directly accessible to his audience. They can only be inferred from the content of his words and the context in which

he uttered them, interpreted in light of his audience's shared understandings and expectations of what particular words mean when they are used in a particular way, in a particular context.

Contextual factors affecting how particular words are likely to be understood, and whether a reasonable person would interpret them as threatening include the identity of the speaker and that of his listener(s), the nature of the relationship between them, and where and how the communication is made. Statements made in the context of a relationship marked by a history of abuse, for example, are inevitably interpreted in light of that history and against the backdrop of an ever-present awareness of the correlation between threats of violence and the likelihood the threats will one day be carried out.[34]

Take, for example, Petitioner's threats against his estranged wife. One of the statements that formed the basis for his conviction of threatening his wife read in relevant part:

> Fold up your PFA [protection-from-abuse order]
> and put it in your pocket
> is it thick enough to stop a bullet?

Pet. Br. at 12. The objectively threatening character of this statement derives in large part from the historical context in which it was made: only days before Petitioner posted the statement, a state court awarded his wife a protection-from-abuse order in part

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[34] See note 14, *supra*. And, indeed, victims are often the best assessors of the risk that the threats of violence they face will be carried out. *See* Sheridan & Roberts, *supra* note 14.

because of other threatening statements Petitioner had posted to the same Facebook page (as well as other abuse his wife reported). J.A. 148-51. Whatever Petitioner says were his private reasons for making the statement, it scared his wife. J.A. 156 ("It made me extremely afraid for my life. I mean I got the protection order to protect myself and my children and he was still making the threats for everyone to see "). Her fear was reasonable. In light of the parties' history and more recent events, Petitioner's statement is one that a reasonable person would regard as conveying an intent to injure or kill.

Similarly, the objectively threatening character of Petitioner's statements describing the best place from which to fire a mortar launcher at his wife's house derives at least in part from Petitioner's inclusion of a diagram accurately depicting the house in which his wife was living since she had left him a few months earlier and the surrounding area. J.A. 153-54.

Under the circumstances, these statements reasonably caused Petitioner's wife to fear for her life. J.A. 153 (testifying that she felt like she was being stalked and that she was afraid for her and her children's lives). That Petitioner later claimed he intended only to vent his frustration is of no moment. The harm was done—and predictably so—when he posted the objectively threatening statements online. The government should be permitted to prevent such harm, and to punish those who inflict it.

B. To Prevent the Real Harm Caused by Threats of Violence, the Focus of the Inquiry Must be on the Objectively Threatening Character of the Message.

The recipient of a threatening message does not—and indeed cannot—know the private motivations the speaker had for sending it. She can only react to the message based on its objective character. If it is objectively threatening, she will predictably fear for her life and will likely take various precautions in order to protect herself. The harm is created by the threat itself.

Because threats of violence cause real harm regardless of the speaker's private intentions, the focus of the inquiry must be on whether, taking all the relevant facts and circumstances into account, the statement is objectively threatening—that is, whether, in light of the statement's content and the context in which it was transmitted, a reasonable person would have foreseen that his audience would regard it as threatening.

The objective, reasonable person standard is fitted to the task of protecting people from the harms caused by threats of violence—the fear of violence, the disruption it engenders, and the risk that the threatened violence will occur. *Black*, 538 U.S. at 360. It allows the government to prosecute abusers and stalkers who make objectively threatening statements that genuinely and reasonably cause fear and all the disruption such fear engenders, without also having the difficult task of proving beyond a reasonable doubt that the perpetrators made the statements with the specific intent to threaten and not, as they often later claim, for some other purpose—*e.g.*, to vent their frustration, to make a joke, to express themselves

artistically, or to harass and annoy, but not to threaten.

Requiring the government to prove beyond a reasonable doubt that the speaker subjectively intended to convey a threat (and did not have some other private purpose) is not adequate to the task of protecting people from the harms threats of violence cause. Such a rule would leave too many victims of threats without any meaningful protection. It would also effectively decriminalize conduct that predictably and reasonably creates a genuine fear of violence with all its attendant psychological, emotional, economic, and social disruptions.

Of course, even under the objective, reasonable person test, the government must still prove the objectively threatening character of the statement beyond a reasonable doubt. In order to qualify as threats under the objective test, statements have to be serious expressions of an intention to inflict bodily harm on another. *See, e.g.*, *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013) (a threat is a statement foreseeably interpreted as "a serious expression of an intention to inflict bodily harm."); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) (a threat is a statement a reasonable person would take "as a serious expression of an intention to inflict bodily harm"), *cert. denied*, 134 S. Ct. 59 (2013); *United States v. White*, 670 F.3d 498, 509 (4th Cir. 2012) (defining "threat" in light of this Court's discussion in *Black* as a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *United States v. Martinez*, 736 F.3d 981, 983 (11th Cir. 2013) (a threat is a statement that "would be construed by a reasonable person as a serious expression of an intent to inflict

bodily harm or death."); *Mabie*, 663 F.3d at 330 (a threat is a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another") (internal quotation marks omitted); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) (a threat is a statement foreseeably interpreted "as a serious expression of an intention to inflict bodily harm upon or to take the life of another individual.") (internal quotation marks and brackets omitted).

Under this definition, two important criteria must be met. First, the expression must be serious. Jokes do not count. Neither does political hyperbole. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).[35]

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[35] *Watts* involved statements made against the President in the context of a political rally against a war—the kind of speech implicating our "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Even though the case dealt with core political speech, the *Watts* Court did not require proof of subjective intent to threaten as an element of the offense. Indeed, it made no reference to the defendant's subjective intent at all. Instead, the Court focused on the meaning of the words used in the context in which they were delivered, concluding that, under the circumstances, Watts's statement could only be characterized as political hyperbole: "Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id.*

Second, the serious expression in question must convey an intention to inflict injury to another.[36] Unlike the political hyperbole at issue in *Watts*, serious expressions of an intention to inflict injury do not implicate that most "profound national commitment" to "'uninhibited, robust, and wide-open' debate" on public issues at the heart of the First Amendment. 394 U.S. at 708.

Proscribing threats of violence against private persons under the objective test does not raise the specter of illegitimate government interference with the deliberative process at the foundation of our democracy, nor does it implicate any of the other concerns animating the Court's First Amendment jurisprudence. We are far from the political arena here. The speech at issue in this case involves no social or political criticism; it constitutes no expression of shared ideology or of social solidarity, or of a commitment to any social cause or group. And the language at issue here is proscribable not because it is "vituperative" or "caustic" or "sharp," (*Watts*, 394 U.S. at 708)—indeed, it may be none of those things—but because it threatens violence and scares people where

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[36] Relying on Judge Sutton's dubitante opinion in *United States v. Jeffries*, Petitioner argues that proof of subjective intent is required as a matter of statutory construction because the term "threat" at the heart of Section 875(c) has always meant "an expression of an intention to injury," and such expression, in turn, connotes a subjective intent to threaten. Pet. Br. at 23 (citing *Jeffries*, 692 F.3d at 483 (Sutton, J., concurring dubitante)). Not so. A speaker's expressions are not the same thing as, and should not be confused with, his private motivations for speaking. If a person's intentions were always the same as (or at least always reliably reflected in) their expressions, it would not be possible to lie.

they live, where they work, and where they sleep, and it does so objectively and predictably.

CONCLUSION

For the foregoing reasons, this Court should hold that proof of subjective intent to threaten is not required for conviction of threatening. Accordingly, the judgment below should be affirmed.

Respectfully submitted,

PAULETTE SULLIVAN MOORE
NATIONAL NETWORK TO END DOMESTIC VIOLENCE
1400 16th Street, N.W.
Suite 330
Washington, DC 20036
(202) 543-5566

HELEN GEROSTATHOS GUYTON
Counsel of Record
SANDRA J. BADIN
TIMOTHY J. SLATTERY
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, DC 20004
(202) 434-7300
hgguyton@mintz.com

Counsel for Amici

APPENDIX

APPENDIX

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of Respondent:

The **National Network to End Domestic Violence (NNEDV)** is a non-profit membership and advocacy organization dedicated to ending domestic violence through legal, legislative, and policy initiatives. The leading voice for domestic violence victims and their advocates, NNEDV comprises a network of 56 state and territorial coalitions against domestic violence representing over 2,000 local organizations that provide shelter, advocacy, and counseling and legal services to victims and survivors of domestic violence and their families.

Working with federal, state, and local policy makers and domestic violence advocates throughout the nation, NNEDV helps identify and promote policies and best practices to advance victim safety. NNEDV was instrumental in promoting Congressional enactment and eventual implementation of the Violence Against Women Act of 1994 and subsequent reauthorizations. NNEDV's broad expertise in the nature and dynamics of domestic violence and its impact on victims, as well as its work on the Safety Net technology project, which focuses on the intersection of technology and intimate partner abuse and stalking and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform its position on the criminal use of technology as a means of perpetrating domestic violence, sexual assault, and stalking.

NNEDV is deeply concerned that interpreting Section § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse from threats of violence by their current and former intimate partners—who often use easily accessible but sophisticated technology to track their victims and threaten them from afar—and from the crippling fear and disruption such threats cause.

The **Arizona Coalition to End Sexual and Domestic Violence (ACESDV)** was formed in 1980 as the Arizona Coalition Against Domestic Violence to unite concerned citizens and professionals to increase public awareness about the issue of domestic violence, enhance the safety of and services for victims of domestic violence, and reduce the incidents of domestic violence in Arizona families. In 2013, the organization expanded its focus and now also addresses the issue of sexual violence in our communities, state and world. Our mission is to lead, to advocate, to educate, to collaborate, to prevent and end sexual and domestic violence in Arizona.

ACESDV is based in Arizona and has significant, statewide presence. We are a non-governmental, non-profit membership organization that works with more than 170 formal members and allies to carry out our mission and objectives. Our objectives are to:

- promote quality services for victims that focus on safety and self-determination;
- advocate and educate on behalf of survivors, their children, and their advocates;

- facilitate partnerships among victim advocates, allied organizations, and state agencies;
- mobilize a statewide voice on sexual and/or domestic violence;
- connect local, state and national work; and
- engage in prevention and social change efforts that challenge the social, economic and political conditions that sustain a culture of violence in which domestic and sexual violence is condoned.

ACESDV is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **California Partnership to End Domestic Violence (the Partnership)** is the federally recognized State Domestic Violence Coalition for California. Like other Domestic Violence Coalitions throughout the U.S. States and territories, the Partnership is rooted in the battered women's movement and the values that define this movement, including working toward social justice, self-determination and ending the oppression of all persons. The Partnership has a 30-year history of providing statewide leadership, and has successfully passed over 100 pieces of legislation to ensure safety and justice for domestic violence survivors and their children. We believe that by sharing expertise,

advocates and legislators can end domestic violence. Every day we inspire, inform and connect all of those concerned with this issue, because together we're stronger.

The Partnership's mission and work is focused on protecting the safety of domestic violence victims and their children and holding batterers accountable. Protection orders are important tools intended to protect survivors physically and emotionally. Violations committed over social media threaten survivor safety and should be seriously considered. By requiring proof of subjective intent to threaten, there is an incentive for abusers to use technology, including social media to further victimize survivors. As technology and social media becomes more prevalent and pervasive in our daily lives, it is imperative that our judicial system continues to provide safety for victims by upholding protection orders.

The **Colorado Coalition Against Domestic Violence (CCADV)** is a non-profit statewide membership organization whose mission is to inspire Colorado to end domestic violence. CCADV was established in 1978 by twelve domestic violence service providers in order to offer a strong statewide voice for survivors of domestic violence, their families, and advocates and currently represents over 60 domestic violence shelters and programs, allied organizations and individuals. Through training, technical assistance and public policy advocacy, CCADV provides comprehensive supports that enhance member's ability to effectively assist diverse survivors of domestic violence (over 25,000 individuals each year).

CCADV recognizes the critical role that the criminal justice system plays in holding domestic violence

offenders accountable and increasing victim safety. CCADV's Public Policy Program has a long history of advocating for and supporting laws and policies that affect survivors of domestic violence, their dependents, and domestic violence offenders.

CCADV shares NNEDV's concerns regarding the Petitioner's interpretation of 18 USC § 875(c). The statements made by the Petitioner were undoubtedly viewed by the victim as a credible threat on her life. Distinctions made between the seriousness and response accorded a threat being made through social media or any other online platform and other forms of communication are arbitrary. Fundamental to their intent, protection orders must hold restrained parties accountable for threats made against protected parties' life and safety. It is imperative that the integrity of provisions to not threaten or harass within protection orders be upheld regardless of the method of communication used lest victims lose faith in these vital legal tools and courts give license to domestic abusers to continue terrorizing their victims.

The **Delaware Coalition Against Domestic Violence** is a statewide, non-profit organization of domestic violence (DV) programs, allied organizations and individuals working to eliminate DV through public education, training, prevention and advocacy efforts. DCADV works with criminal justice, health care, business and social service systems and communities throughout Delaware to improve services for victims of DV.

The Delaware Coalition also partners with local, state and national organizations on a variety of initiatives designed to foster a broad and comprehensive understanding of the impact of domestic violence on individuals, communities and

societies. These initiatives range include supporting vital federal legislation such as the Violence Against Women Act, engaging in primary prevention efforts using a public health approach and joining in a national collaborative designed to foster use of a trauma informed approach in systems and services.

DCADV is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Georgia Coalition Against Domestic Violence (GCADV)** is a not-for-profit organization incorporated in the state of Georgia representing 52 local-level domestic violence shelters and non-residential programs throughout the state. Tracing our roots back to 1980, GCADV brings together member agencies, allied organizations and supportive individuals who are committed to ending domestic violence. Guided by the voices of survivors, we work to create social change by addressing the root causes of this violence. GCADV leads advocacy efforts for responsive public policy and fosters quality, comprehensive prevention and intervention services throughout the state. As a part of its public policy and systems advocacy efforts, GCADV works with law enforcement, advocates and prosecutors to ensure that victims can call upon our criminal justice system when they are threatened and or stalked by abusers. Interpreting 18 USC § 875(c) in the manner suggested

by Petitioner would expose victims to unending threats without any criminal justice recourse.

The **Guam Coalition Against Sexual Assault & Family Violence (GCASAFV)** is a non-profit organization comprised of member agencies representing public/private service providers, community partners, and other government allies. GCASAFV focuses on addressing sexual assault and family violence on Guam at a community level; providing education, outreach and training; identifying and addressing gaps in services to victims of sexual assault and family violence; and assisting in building the capacity of community organizations and networks to meet Guam's sexual assault and family violence needs.

GCASAFV is deeply concerned that abusers will be given license to threaten victims, without recourse, if the subjective test is adopted rather than the appropriate objective standard which requires the prosecution to only provide and prove all available and credible evidence including the content of Petitioner's communications and the context in which those communications were transmitted. To adopt Petitioner's argument would embolden abusers and yank jurisprudential protections from under victims' very feet.

The **Hawaii State Coalition Against Domestic Violence (HSCADV)** is a not-for-profit organization and a statewide partnership of domestic violence programs and shelters, incorporated in the state of Hawaii in 1980. HSCADV is comprised of the director of spouse abuse shelters and psycho-educational counseling programs for victims and perpetrators of spouse abuse on each of the islands, as well as the Victim Witness Assistance Division of the Honolulu

Prosecutor's Office, Legal Aid Society, Hawaii Immigrant Justice Center, and the Domestic Violence Action Center. HSCADV is troubled that the lives of victims of domestic violence will forever be at the crippling mercy of abusers' threats if the Court adopts Petitioner's interpretation of 18 USC § 875(c).

The **Illinois Coalition Against Domestic Violence (ICADV)** is a membership organization consisting of 53 domestic violence programs throughout the state of Illinois. The ICADV provides technical assistance, training, and advocacy to and on behalf of our programs and the victims they serve. The general purpose of the Illinois Coalition Against Domestic Violence is: to eliminate violence against women and their children; to promote the eradication of domestic violence across the state of Illinois; to ensure the safety of survivors, their access to services, and their freedom of choice; to hold abusers accountable for the violence they perpetrate; and to encourage the development of victim-sensitive laws, policies and procedures across all systems that impact survivors of domestic violence.

ICADV is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Indiana Coalition Against Domestic Violence, Inc. (ICADV)** is a non-profit organization incorporated in 1980 (www.icadvinc.org) to end domestic violence. The Indiana Coalition Against

Domestic Violence is a statewide alliance of domestic violence and sexual assault programs law enforcement, prosecutors, criminal justice agencies, faith-based organizations, and concerned individuals. We provide technical assistance, resources and training to those who serve victims of domestic violence and sexual assault; and advocate for social and systems change through public policy, public awareness, and prevention.

The ICADV specifically provides training and technical assistance to Indiana shelters, advocates and criminal justice providers around the identification, documentation and intervention of technology-facilitated intimate partner violence. Our work focuses on understanding the different ways in which technology, specifically social media and other forms of electronic communication, is used to stalk, harass, and further control survivors of intimate partner violence. This work is done in partnership with the National Network to End Domestic Violence's Safety Net project which focuses on the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform its position on the criminal use of technology as a means of perpetrating domestic violence and other state coalitions.

ICADV is concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

Jane Doe Inc. (JDI), the Massachusetts Coalition Against Sexual Assault and Domestic Violence, is a statewide organization of fifty-seven programs that provide direct services to victims and survivors of sexual and domestic violence. Guided by the voices of survivors, JDI brings together organizations and people committed to ending domestic violence and sexual assault, creating social change by addressing the root causes of this violence, and promoting justice, safety and healing for survivors. JDI advocates for responsible public policy, promotes collaboration, raises public awareness, and supports its member organizations to provide comprehensive prevention and intervention services.

JDI is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a statewide non-profit organization aimed at eliminating and preventing sexual and domestic violence. KCSDV's membership is the 29 sexual and domestic violence programs serving survivors of domestic violence and sexual assault across the state. For the last 30 years, KCSDV has been Kansas's leading voice on sexual and domestic violence. We enhance response and prevention efforts through training, public policy advocacy, public awareness programs, and support to professionals and local crisis centers.

KCSDV is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, the internet or other electronic or social media platforms to threaten, taunt, isolate, frighten, and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Maine Coalition to End Domestic Violence (MCEDV)** is a non-profit membership and advocacy organization dedicated to ending domestic violence through prevention, training and policy initiatives. The leading voice for domestic violence victims and their advocates in Maine, MCEDV has eight domestic violence resource centers that provide shelter, advocacy, and counseling and legal services to adults, children and communities impacted by domestic violence and abuse.

MCEDV helps identify and promote policies and best practices to advance victim safety and to hold abusers accountable for their actions. MCEDV has been instrumental in establishing a homicide and serious assault reduction program state wide in Maine, including risk assessment and enhanced safety planning teams in each county. MCEDV also took part in early cyber abuse trainings with the Safety Net Project, resulting in our providing training on Abuse in the Digital Age statewide for advocates, law enforcement and prosecutors over the past four years. This focus on the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform our position on the criminal use of technology as a means of perpetrating domestic

violence. Our Law Court has recently considered the issue of threats via digital media in the issuance of a protection order, (*Clark v. McLane*), finding that the issuance of the protection order was appropriate in that case. MCEDV coordinated the preparation of amicus briefs on behalf of the victim and in doing so became even more aware both the increasing prevalence of cyber-threats in our state, as well as the negative impact of cyber-threats on victims' lives.

MCEDV echoes NNEDV's concern that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Missouri Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in Missouri in 1980. As a membership organization of 125 programs providing domestic and sexual violence services, MCADSV serves as the statewide advocacy, education and communications network to advance the prevention of violence against women and to address the needs of those victimized by the violence. MCADSV is recognized for its successes during the past 30 years in advocacy work with state, local and national policy makers to identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. MCADSV's current CEO worked with advocates and Congress members to draft the original

Violence Against Women Act of 1994 and continues to participate in national policy leadership for the implementation of all subsequent reauthorizations of the Act.

Therefore, MCADSV, on behalf of domestic violence victims in Missouri and all of the Missouri advocates and programs who serve them, is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will encourage abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Montana Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in the state of Montana in 1986 (www.mcadsv.com). MCADSV is a statewide coalition of individuals and organizations working together to end domestic and sexual violence through advocacy, public education, public policy, and program development. Our mission is to support and facilitate networking among our member organizations while advocating for social change in Montana. MCADSV represents a majority of the state's domestic and sexual violence service providers and is the primary statewide organization providing training and technical assistance to these programs. MCADSV is deeply concerned that the Petitioner's reading of 18 USC § 875(c) will permit abusers to threaten and stalk victims with impunity.

The **Nevada Network Against Domestic Violence (NNADV)**, a nonprofit organization founded in 1980 and incorporated in the State of

Nevada, serves as the professional association for the state's thirteen member domestic violence organizations and as the primary representative of battered women and their children in the public policy arena. NNADV members share the goal of ending domestic violence through community education, public policy development, and services for victims.

NNADV's broad expertise in the nature and dynamics of domestic violence and its impact on victims, as well as its recent work on the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform its position on the criminal use of technology as a means of perpetrating domestic violence.

NNADV shares the concern that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will encourage abusers to use technology, including social media, to continue to control and threaten their victims. It will decrease a victim's options to respond to electronic abuse.

The **New Hampshire Coalition Against Domestic and Sexual Violence (NHCADSV)** is a not-for-profit organization committed to creating safe and just communities through advocacy, prevention and empowerment of anyone affected by sexual violence, domestic violence and stalking in New Hampshire. This mission is accomplished by the Coalition, which includes 14 independent community-based member programs, a board of directors, and a central staff working together to influence public policy on the local, state and national levels; ensure that quality services are provided to victims; promote

the accountability of societal systems and communities for their response to sexual violence, domestic violence and stalking; and prevent violence and abuse before they occur. In 2013, NHCADSV member programs provided services to over 15,000 victims. NHCADSV has an interest in this case because it is critically important to our work to ensure that abusers are prohibited from using the Internet or other electronic or social media platforms as a means to perpetuate the abuse of their victims, and it is crucial that when this abuse occurs, victims have recourse and protection in the justice system.

The **New Jersey Coalition for Battered Women (NJCBW)** is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include 29 domestic violence programs in New Jersey, including the 23 lead domestic violence agencies. NJCBW advocates for victims of domestic violence with state level governmental and private agencies, the state legislature, judiciary and governor to support legislation and policies that will increase safety and options for victims of domestic violence.

NJCBW has expertise in providing information, resources, technical assistance and training to domestic violence programs, the public, and organizations involved with New Jersey's response to domestic violence. NJCBW advocates locally and statewide on a variety of policy matters, including legislation, to improve New Jersey's response to domestic violence and has previously served as amicus curiae on a number of cases before the New Jersey Supreme Court.

NJCBW shares the concern of the National Network to End Domestic Violence that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten will make it more difficult to protect victims of abuse and prosecute abusers. Such a requirement will not be effective in deterring abusers from using technology, including social media, to continue their abuse intimidation and abuse.

The **New Mexico Coalition Against Domestic Violence (NMCADV)** is a 501c3 organization that provides training, technical assistance, information, education, referrals and other support to domestic violence programs and stakeholders across New Mexico. We serve as the collective voice for victims of domestic violence and participate actively in systems change efforts statewide. The NMCADV proudly joins this *amicus* brief because requiring proof of a subjective intent to threaten will make it more difficult to protect victims of domestic violence and prosecute their abusers. With the skyrocketing rates of domestic violence we see across this country the last thing we need is a requirement which will embolden abusers to use technology to threaten and intimidate without recourse.

The **New York State Coalition Against Domestic Violence (NYSCADV)** is a not-for-profit organization incorporated in the State of New York in 1978 (www.nyscadv.org). NYSCADV works to create and support the social change necessary to prevent and confront all forms of domestic violence. As a statewide network of over 100 local domestic violence member programs, NYSCADV achieves our mission through activism, training, prevention, technical assistance, legislative development, advocacy, and leadership development.

Working with policy makers, coalitions, and domestic violence advocates across both New York State and the nation, NYSCADV monitors and provides input, guidance and leadership in policy and legislative matters affecting victims of domestic violence and their children. NYSCADV educates, trains, and advises members and other advocates on legislative and policy changes and processes, and encourages our members to communicate with their legislators. NYSCADV also provides input regarding various agency policies related to survivors and domestic violence programs.

Domestic violence offenders routinely use threats, both direct and indirect, as part of their pattern power and control over their partners. These threats have contextual meaning that cause victim's alarm and fear. NYSCADV is concerned that requiring proof of a subjective intent to threaten will allow abusers to remain unchecked in their pattern of abuse. And, in the context of this case, abusers will be incentivized to use technology, such as social media, to perpetrate this abuse with impunity.

The **Ohio Domestic Violence Network (ODVN)**, a not-for-profit membership organization incorporated in the state of Ohio and is comprised of 72 domestic violence programs and various other allied professionals representing batterers' intervention programs and other legal and social service agencies that provide services and advocacy to victims and perpetrators of domestic violence. The member agencies represent all regions of the state, including rural and urban areas. ODVN advances the principle that all people have the right to an oppression and violence free life; fosters changes in our economic, social and political system and brings leadership, expertise and

best practices to community programs. ODVN seeks individual, legislative and social change, produces and shares information, and educates the public and other agencies about domestic violence and resource options. As Ohio's largest and most comprehensive resource on domestic violence, ODVN represents the interests of and works arm in arm with domestic violence agencies and victims throughout Ohio. ODVN is a member of the National Network to End Domestic Violence.

ODVN's has considerable expertise in the dynamics of domestic violence and its impact on victims. This expertise includes an understanding of the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims. In our work on behalf of domestic violence survivors ODVN has provided training to advocates and provided resources to survivors on the potential criminal use of technology as a means of perpetrating domestic violence.

ODVN is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Pennsylvania Coalition Against Domestic Violence (PCADV)**, is a private non-profit organization working at the state and national levels to eliminate domestic violence, secure justice for all victims, enhance safety for families and communities, and create lasting systems and social change. The first domestic violence coalition in the nation, PCADV was

established in 1976 when a handful of grassroots women's groups in the state joined together to lobby for legal protections and to develop a network of services for victims of domestic violence. The Coalition has grown to a membership of 60 organizations across Pennsylvania providing shelters, hotlines, counseling programs, safe home networks, legal and medical advocacy projects, and transitional housing for victims of abuse and their children. Over the past three decades, these programs have offered safety and refuge to close to 2 million victims and their children from every corner of the commonwealth.

PCADV and its member programs view domestic violence perpetrators' use of social media including Facebook to stalk, harass and threaten acts of violence against their victims with apprehension and alarm. Interpreting 18 U.S.C. § 875(c) in a way that requires proof of a subjective intent to threaten, as proposed by the Petitioner, will only further empower abusers to employ their threatening and abusive tactics via Internet mediums and claim exercise of their freedom of speech. Meanwhile the victims live in fear and wait for the moment that the perpetrator will carry out his or her threats. Moreover, law enforcement's efforts to protect victims and communities from harm will be hampered if they must determine whether the subjective intent of a perpetrator is to indeed harm the persons or school children that their words indicate they want to injure.

The **Rhode Island Coalition Against Domestic Violence (RICADV)** is a non-profit membership and advocacy organization dedicated to ending domestic. We work to achieve this mission by providing leadership on the issue of domestic violence and supporting our member agencies. Together, our member agencies

provide services to over 10,000 victims of domestic abuse each year, and respond to over 15,000 calls for help and referrals.

RICADV is dedicated to helping identify and promote policies and best practices to advance victim safety. RICADV has been involved in promoting Congressional enactment and eventual implementation of the Violence Against Women Act of 1994 and subsequent reauthorizations. We have worked for 35 years to strengthen the laws in Rhode Island to protect victims of domestic violence and hold batterers accountable, and have seen firsthand the impact that new technologies have had on victims. Too often, victims are terrorized and threatened by their abusers using new technologies, and it is imperative that there be some means of legal recourse for them.

RICADV is incredibly concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will provide additional encouragement to abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a non-profit membership and advocacy organization dedicated to ending domestic violence through legal, legislative, and policy initiatives. The leading voice for domestic violence victims and their advocates in South Carolina, SCCADVASA comprises a network of 23 local non-profit organizations that provide shelter, advocacy, hospital

accompaniment and counseling and legal services to survivors of domestic and sexual violence.

Working with federal, state and local policy makers and domestic and sexual violence advocates throughout the state, SCCADVASA helps identify and promote policies and best practices to advance victim safety. SCCADVASA's broad expertise in the nature and dynamics of domestic and sexual violence and their impact on victims, as well as our trainings for advocates statewide about NNEDV's Safety Net project, which focuses on the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform its position on the criminal use of technology as a means of perpetrating domestic and sexual violence.

SCCADVASA is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Vermont Network Against Domestic and Sexual Violence** is a feminist organization committed to eradicating domestic and sexual violence through advocacy, empowerment and social change. The Vermont Network is a coalition of 14 Member domestic violence and sexual violence Programs located throughout Vermont, and a statewide office located in Montpelier.

VNADV is very concerned that if 18 USC § 875(c) is interpreted to require proof of a subjective intent to threaten, as Petitioner proposes, it will be so very difficult for victims to prove that it will embolden abusers and imperil victims across the country. Allowing this behavior from abusers to continue will also encourage the abuse and send the message that society finds this acceptable and indeed it makes it more likely that these abusers will go even further.

The **Virginia Sexual and Domestic Violence Action Alliance (VSDVAA)** is a not-for-profit organization incorporated in Virginia in 1981 (www.vsdvalliance.org) to create a Virginia free from sexual and domestic violence. We are Virginia's leading voice on sexual and domestic violence. Over the past 30 years, we built an extensive network of agencies and individuals to speak in a unified voice on issues related to sexual and domestic violence. Our membership includes advocates at local accredited domestic and sexual violence service agencies, survivors, attorneys, law enforcement officers, health professionals and community members.

Through our public policy work we strive to strengthen state laws that promote safety for victims and hold offenders accountable. We operate the statewide Virginia Family Violence and Sexual Assault Hotline, which answers thousands of calls each month and offers resources, support and safety planning to people in crisis, family and friends and allied professionals. And we are engaged in a variety of prevention initiatives to reduce risk factors and promote healthy communities and relationships-with the ultimate goal of reducing the incidence and prevalence of both sexual and domestic violence.

The Action Alliance is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as proposed by the Petitioner, will embolden abusers to use technology, such as social media, to continue to threaten, intimidate, and frighten victims-making it more difficult for victims to take action against abusive behavior and protect their safety.

Every day, technology becomes a larger part of all our lives—bringing both benefits and challenges. The same is true for victims of sexual violence, domestic violence, and stalking. While technology has created new ways for victims to reach out for support, it has also created new means for perpetrators of these crimes to threaten and inflict fear in their victims. It is critical that we protect a victims' ability to seek safety and justice through the law—even as we make advances in technology—so that we can continue to hold perpetrators of abuse accountable for their actions regardless of any means, no matter how new, they use to threaten, intimidate, control, or inflict fear in victims.

The **Washington State Coalition Against Domestic Violence (WSCADV)**, is a non-profit statewide membership organization comprised of over 70 organizations and individuals across Washington State committed to ending domestic violence across Washington State. The core commitment of WSCADV is to support domestic violence survivors and emergency shelter and advocacy programs by advocating for laws and public policies that promote safety, justice and autonomy for victims and their children. WSCADV is particularly concerned that if 18 USC § 875(c) is interpreted to require proof that a defendant specifically intended to threaten a victim,

perpetrators that use technology and social media to further their abuse will be able to stalk, abuse, and control their victims with impunity.

The **West Virginia Coalition Against Domestic Violence (WVCADV)** is a not-for-profit organization incorporated in the state of West Virginia (www.wvcadv.org). Founded in 1981, WVCADV's mission, along with the ultimate vision of social justice, is to work to end violence against women through partnerships, advocacy and direct services. The West Virginia Coalition Against Domestic Violence plays an instrumental role in advocating for laws and policies that affect battered women and their children, such as the Violence Against Women Acts of 1994, 2000, and 2005. WVCADV recognizes the critical importance that domestic violence statutes play in the struggle to end domestic violence.

WVCADV is troubled by the interpretation of 18 USC § 875(c) requiring proof of a subjective intent to threaten. Such a requirement will embolden abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **End Domestic Abuse WI: the Wisconsin Coalition Against Domestic Violence, Inc. (END ABUSE)** is a non-profit membership and advocacy organization dedicated to ending domestic violence through legal, legislative, and policy initiatives. The leading voice for domestic violence victims and their advocates in Wisconsin, END ABUSE serves the 73 primary purpose domestic violence programs through training and technical assistance.

END ABUSE is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

Through a collective voice, the **Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA)** is committed to provide leadership, education, and systems advocacy to advance social change and end violence. The WCADVSA is a non-profit organization representing the 24 domestic violence and sexual assault advocacy programs in Wyoming. As the leading voice for domestic violence victims and their advocates in Wyoming, the WCADVSA's work includes the following programs: AmeriCorps; Civil Legal Services an Access to Justice; Economic Justice; Organizational an Leadership Development; Primary Prevention; Public Policy; Silent Witness Initiative; Training and Technical Assistance; and Transitional Housing.

The WCADVSA has been an active member of the National Network to End Domestic Violence since the organization's inception. The WCADVSA, along with our sister coalitions, have worked alongside NNEDV for the 1994 enactment and implementation of the Violence Against women Act and subsequent reauthorizations.

The misuse of technology and intimate partner abuse greatly impacts the safety, privacy, accessibility, and civil rights of victims. For example, James Jebidiah Stipe, a former boyfriend of a

Wyoming woman used Craigslist to arrange for a violent rape of her in 2009. (http://articles.latimes.com/2010/jan/11/nation/la-na-rape-craigslist11-2010jan11) Mr. Stipe was sentenced to 60 years in prison.

The WCADVSA is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

AMICUS CURIAE BRIEF

No. 13-983

IN THE

Supreme Court of the United States

ANTHONY D. ELONIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On a Writ of Certiorari to the United States Courts of Appeals for the Third Circuit

BRIEF OF PEOPLE FOR ETHICAL TREATMENT OF ANIMALS, INC. (PETA), CAROL CROSSED, CHRIS COATNEY, DANIEL MILLER, OPERATION RESCUE, CITIZENS FOR A PRO-LIFE SOCIETY, PRO-LIFE ACTION LEAGUE, INC., MISSIONARIES TO THE PREBORN, DEFEND LIFE, SURVIVORS, PRO-LIFE ACTION MINISTRIES, AND VOTELIFE AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THOMAS BREJCHA
PETER BREEN
THOMAS MORE SOCIETY
19 South LaSalle St., Ste. 603
Chicago, Illinois 60603
(312) 782-1680

BRIAN J. MURRAY
Counsel of Record
MEGHAN E. SWEENEY
JONES DAY
77 W. Wacker, Ste. 3500
Chicago, Illinois 60601
(312) 782-3939
bjmurray@jonesday.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF THE *AMICI CURIAE* [1]

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. (PETA) is a nonprofit charitable organization dedicated to protecting animals from abuse, neglect, and cruelty. PETA operates under the principle that animals are not ours to eat, wear, experiment on, use for entertainment, or abuse in any way. PETA advances this mission through investigations, litigation, education, and advocacy. PETA's advocacy efforts include organizing protest campaigns, consistent with the greatest protest traditions of this nation.

CAROL CROSSED is a resident of Rochester, New York, whose religious faith is inextricably intertwined with activism. She has been active in peaceable protest against war, nuclear weapons, the suppression of rights of women and children, and abortion. She has been arrested twice in one day with the legendary peace activist, Fr. Daniel Berrigan, S.J.

CHRIS COATNEY is an anti-abortion protester in the Detroit area who spends many hours "sidewalk counseling" and urging women to choose alternatives to abortion. Coatney was ordered to

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

stay away from one abortion provider's premises, although no finding was made as to Coatney's subjective intent, which was wholly non-violent. He is now appealing his "stay away" order to the Michigan Court of Appeals.

DANIEL MILLER is a coordinator for sidewalk counselors in Milwaukee, Wisconsin, who was likewise subject to a "stay away" order based on his counseling activities outside of an abortion clinic.

OPERATION RESCUE is a leading Christian pro-life activist organization, based in Wichita, KS, led by Troy Newman and Cheryl Sullenger. Operation Rescue campaigns to expose wrongdoing and unsafe conditions at abortion providers, forcing many to close. It also operates a fleet of Truth Trucks that traverse the United States and uses other peaceful, legal means to oppose abortion.

CITIZENS FOR A PRO-LIFE SOCIETY is a Detroit area activist organization, founded on Catholic principles of morality and social justice. It advocates the sanctity of human life, especially the right to life of unborn children, through public demonstrations, pickets, educational programs, literature distribution, conferences, seminars, workshops, and lectures. It also reaches out to mothers in crisis pregnancy and offers material and spiritual aid. Its director, Dr. Monica Miller, Ph.D., is an associate professor of theology at Madonna University, Livonia, Michigan, and the author of many books and articles, including ABANDONED: THE UNTOLD STORY OF THE ABORTION WARS (2012).

PRO-LIFE ACTION LEAGUE, INC., based in Chicago, Illinois was sued for antitrust and racketeering (RICO) violations by NOW and the abortion industry in 1986. The case lasted 28 years and led to three U.S. Supreme Court opinions, the last two in its favor by 8-1 and 8-0 margins. Founded in the early 1980's by Joseph and Ann Scheidler, and now led by Eric Scheidler, the League conducts a broad spectrum of lawful educational and activist programs including Truth Tours.

MISSIONARIES TO THE PREBORN is a Milwaukee group of Christian activists who have come together as a last line of defense for their preborn neighbors. Led by Pastor Matt Trewhella, the Missionaries carry on peaceable Truth Tours and other activities to end abortion.

DEFEND LIFE, a Washington, D.C.-Maryland activist group founded in 1987 by Eileen Bolgiano and Jack Ames, opposes abortion and conducts Truth Tours in the mid-Atlantic area, displaying the graphic truth of abortion. Defend Life also holds an annual convention, conducts some sidewalk counseling, and hosts a pro-life lecture series.

SURVIVORS is a pro-life activist ministry, based in California and led by Jeffrey Lee White. The group is dedicated to educating the youth of America, specifically those born before the *Roe v. Wade* decision. The group takes an active stand and engages in extensive training on peaceable activism.

PRO-LIFE ACTION MINISTRIES, based in St. Paul, Minnesota and led by Brian Gibson, ministers to women by sidewalk counseling and public witness

in the Twin Cities and elsewhere. It conducts an annual national symposium on lawful, peaceable, non-violent sidewalk counseling methods.

VOTE LIFE AMERICA, is based in the Chicago area, and is led by Jim Finnegan and Arlene Sawicki. It conducts educational and activist campaigns, including picketing and voter education drives.

"If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued." *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1019 (9th Cir. 2001), *aff'd in part, vacated in part, remanded by* 290 F.3d 1058 (9th Cir. 2002). That key tenet, embodied in the First Amendment and the cherished freedoms it protects, is at stake here. Indeed, *amici* have a substantial interest in the outcome of this case because it has a real potential to chill political protest activity. Specifically, the Third Circuit's opinion below is troubling because, unless proof of a subjective intent to threaten is required to secure a conviction under 18 U.S.C. § 875(c) (or myriad similar statutes already on the books), this statute may be used as a weapon to draw and wield against protestors or opposition groups that challenge controversial policies or seek to promote change.

Throughout history, many courageous Americans have shared the sentiment of Dr. Martin Luther King, Jr. that "[h]e who accepts evil without

protesting against it is really cooperating with it."[2] Indeed, political protest has played an integral role in facilitating social progress in the United States since its Founding, which itself was an act of political protest.[3] For example, the Abolitionist, Women's Suffrage, and Civil Rights Movements all succeeded in securing rights for individuals previously denied what are today considered basic freedoms. In other instances, organized protests have provided an opportunity for everyday Americans to unite to more effectively communicate their opposition to government policies. Examples of these organized protests include the Boston Tea Party, anti-Vietnam War protests, pro-life demonstrations, and, most recently, the Occupy Wall Street protests.

To be clear: we do not here mean to condone violence or true threats of violence intended to induce fear of imminent harm. And when protest clearly crosses over into violence or threats of violence, there is good reason for it to fall outside of the First Amendment's categorical protection. But that boundary is often murky. Inherent in most

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[2] *See* DR. MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 51 (1958).

[3] *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies. . . .").

protests are messages of opposition to authority, language meant to arouse passions, and calls to action. Those whose policies are challenged or who prefer the *status quo* may perceive such forceful language as intimidating or threatening. So while we do not defend truly threatening or violent behavior, we believe that the boundary demarcating such behavior from protected protest activity must be drawn so as to bring close cases within the ambit of protection.

Requiring only an objective "reasonable person" inquiry in order to bring speech outside of the protection of the First Amendment does not adequately police that boundary. Rather, such a rule would allow majority groups or the Government to use the criminal threats statute as a sword to silence opposition on issues where dissenting voices are critical.[4]

This Court put it perhaps most powerfully in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which arose in the tumultuous throes of the Civil Rights Movement. In that case, seventeen white merchants brought a lawsuit against two corporations, the NAACP and Mississippi Action for Progress ("MAP"), as well as 146 individuals, seeking lost profits resulting from the seven year

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[4] For additional discussion of the dangers of statutes being used as a "sword" to silence political protestors, see Brian J. Murray, Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999).

boycott of their stores in Port Gibson, Mississippi. *Id.* at 889-90. The purpose of the boycott was to "secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice." *Id.* at 907. During the boycott, Charles Evers, the Field Secretary of the NAACP in Mississippi, gave several rousing speeches stating that boycott violators would be disciplined, and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *See id.* at 900 n.28, 902. In one speech he also cautioned that the "Sheriff could not sleep with boycott violators at night." *Id.* at 902. As part of the boycott, observers known as "enforcers," "deacons," or "black hats," kept track of who entered white-owned businesses and their names were read at Claiborne County NAACP meetings. *Id.* at 894. Though the boycott was peaceful, for the most part, there were some recorded instances of violence: in two cases, shots were fired into boycott violators' homes, a brick was thrown through a violator's windshield, and a garden was damaged. *Id.* at 904.

At trial, 130 of the defendants were held jointly and severally liable on three different conspiracy theories, *id.* at 890-92, and were ultimately held responsible for plaintiffs' lost earnings during the seven-year boycott, *id.* at 898. The Mississippi Supreme Court reversed as to two theories of liability, and held that plaintiffs failed to prove their case as to MAP and thirty-seven individual defendants. *Id.* at 894, 896. The court, however, rejected the remaining defendants' First Amendment defense based on the fact that certain defendants

"acting for all others" engaged in physical force against persons and property during the boycott. *Id.* at 894. Likewise, the court reasoned, "[i]ntimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results." *Id.*

This Court reversed, however, underscoring the need for a subjective inquiry in order to prevent majority groups from using "true threats" to punish and silence protestors. The Court found two critical justifications to be compelling. *First*, while acknowledging that the defendants sought to "persuade others to join the boycott through social pressure and the 'threat' of social ostracism," *id.* at 909-10, the Court nevertheless held that "[s]peech does not lose its protected character . simply because it may embarrass others or coerce them into action," *id.* at 910. While the First Amendment does "not protect violence," *id.* at 916, "[t]he claim that the expressions were intended to exercise a coercive impact . does not remove them from the First Amendment." *Id.* at 911. *Second*, the Court recognized the dangers of imposing liability "on an individual solely because of his association with another." *Id.* at 918-19. Instead, it held that "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals *and that the individual held a specific intent to further those illegal aims.*" *Id.* at 920 (emphasis added). As to Evers's liability in particular, the Court acknowledged that "[i]n the passionate atmosphere in which the speeches were delivered, they might have been understood as

intending to create a fear of violence whether or not improper discipline was specifically intended." *Id.* at 927. Yet—in a passage critical to the current case before this Court—it continued that since "there [wa]s no evidence—apart from the speeches themselves—that Evers . . directly threatened acts of violence," *id.* at 929, he could not be held liable for the violent actions of other group members.

Throughout our history, courageous Americans like Charles Evers have—by their words and actions—inspired others to challenge discrimination and other forms of injustice. To equate these freedom-fighters with common felons is, we submit, utterly wrong. *Amici* respectfully submit this brief to highlight the threat to such protest activity posed by the Third Circuit's ruling in *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013). Requiring only an objective "reasonable person" test to determine what is a "threat" before an individual can be convicted pursuant to 18 U.S.C. § 875(c), as that decision does, will surely chill protest activity, bankrupting the very "marketplace of ideas" that has played a critical role in the progress of this nation. *See* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 1064-65 (2002) (hereinafter "Blakey & Murray") ("[W]here political, social, economic, other opponents are given the powerful weapon of civil litigation to curtail the free speech or expressive conduct of the opposition, a weapon not limited by prosecutorial discretion First Amendment freedoms are not only unjustifiably curtailed but also the fundamental

principles of the criminal law are impermissibly distorted."). Fidelity to core First Amendment values requires the Court to avoid that result.

SUMMARY OF ARGUMENT

The issue before this Court cuts to the core of the First Amendment and threatens one of the most basic freedoms enjoyed by American citizens: the right to protest. The statute at issue in this case, 18 U.S.C. § 875(c), states, "[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." Though the statute does not specify a state of mind requirement, proof of a subjective intent to threaten should be required for two reasons:

1. This Court's First Amendment jurisprudence requires that any categorical exception to First Amendment protection be narrowly drawn, including the "true threats" exception at issue in this case. To require only an objective requirement, like the Third Circuit below, would sweep speech that was traditionally protected by the First Amendment outside of its protective realm. Likewise, it would offer those who oppose a protestor's message to use the statute as a sword to silence opposition. This outcome would not comport with well-settled First Amendment jurisprudence holding that speech should be protected to the greatest extent possible, even when it may be perceived as threatening.

2. Likewise, bedrock principles of criminal law require proof of subjective intent before convicting under the statute. Since our system of federal criminal law is rooted in the common law, when no state of mind is listed in a statute, strict liability is the exception, not the rule. Instead, this Court has instructed that, generally, where a statute is silent as to state of mind, proof of scienter, or knowledge, is the *minimum* required both as to the conduct at issue, and to the result. But allowing an objective-only test here would require merely a showing of "negligence" based on what a "reasonable person" would perceive as threatening. This low threshold is unacceptable where at least knowledge is the default presumption. And in the context of the First Amendment, where the Court has made clear that categorical exceptions should not be overly broad, proof of specific intent ("purpose") is required instead of knowledge to assure the greatest possible protection for speech.

ARGUMENT

I. REQUIRING PROOF OF A SUBJECTIVE INTENT TO THREATEN FOR CONVICTION UNDER 18 U.S.C. § 875(C) IS COMPELLED BY THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

The right of American citizens to engage in political protest lies at the heart of the First Amendment. Indeed, the United States is a nation founded as an act of political protest, and the Founders repeatedly expressed a desire to protect

political dissent. James Madison expressed a desire to protect liberty even where it resulted in political factions:

> By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community. . .
>
> There are . . two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.
>
> It could never be more truly said than of the first remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.
>
> The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.

THE FEDERALIST NO. 10, at 78 (Clinton Rossiter ed., 1961). Likewise, in a 1787 letter to Abigail Adams, Thomas Jefferson stated,

> The spirit of resistance to government is so valuable on certain occasions, that I wish it to be always kept alive. It will often be exercised when wrong, but better so than not to be exercised at all. I like a little rebellion now and then. It is like a storm in the atmosphere.

Letter from Thomas Jefferson to Abigail Adams (Feb. 22, 1787), *available at* http://founders.archives.gov/documents/Jefferson/01-11-02-0182 (last visited Aug. 21, 2014). Unsurprisingly, those who influenced the Founders also agreed that political dissent was worth protecting. *See, e.g.*, JOHN STUART MILL, ON LIBERTY, ch. 2 (1859) ("[E]very opinion which embodies somewhat of the portion of truth which the common opinion omits[] ought to be considered precious, with whatever amount of error and confusion that truth may be blended."). Ultimately these urges to protect dissent took form in the Bill of Rights in 1791, wherein the First Amendment codified the protection of speech in the United States Constitution. It makes clear: "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I.

Since its adoption, the First Amendment has expanded over time. For example, it now applies not just to Congress, but also to the States. U.S. Const. amend. XIV; *see also Gitlow v. New York*, 268 U.S.

652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."). And it protects not just speech, but also other forms of protest activity, including demonstrating, [5] leafleting,[6] publishing and disseminating literature,[7] marching and demonstrating,[8] and picketing.[9]

To be sure, some speech remains regulable based on its content alone.[10] But this Court has determined that these categorical exceptions to First

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[5] *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

[6] *See, e.g., United States v. Grace*, 461 U.S. 171, 183 (1983); *Schneider v. Irvington*, 308 U.S. 147, 165 (1939).

[7] *See, e.g., Jamison v. Texas*, 318 U.S. 413, 414 (1943).

[8] *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

[9] *See, e.g., Carey v. Brown*, 447 U.S. 455, 460 (1980); *Police Dep't v. Mosley*, 408 U.S. 92, 94 (1972).

[10] *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (excepting the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"); *New York v. Ferber*, 458 U.S. 747, 765-66 (1982) (excepting child pornography); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980) (excepting commercial speech in some instances); *Watts v. United States*, 394 U.S. 705, 707 (1969) (excepting "true threats").

Amendment protection should be "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky*, 315 U.S. at 571-72. Indeed, this Court "since the 1960s ha[s] narrowed the scope of the traditional categorical exceptions," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), and recently noted its reluctance to create new categorical exceptions, even for speech that may be "valueless or unnecessary." *See United States v. Stevens*, 559 U.S. 460, 469-71 (2010).

The "true threats" categorical exception at issue in this case often arises in the context of political protests or similarly emotionally charged situations. Several decisions of this Court have emphasized, however, that this category of unprotected speech must be narrowly circumscribed so as to give the First Amendment adequate breathing space. In *Watts v. United States*, 394 U.S. 705 (1969) (per curiam), this Court held that a statute punishing those who knowingly or willfully threaten the President was constitutional on its face only because the Government was initially required to "prove a true 'threat'" in order to fulfill the "willfullness" requirement of the statute. *Id.* at 707-08. The Court concluded that the speech at issue, which took place during an anti-Vietnam demonstration, [11] was

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[11] On August 27, 1966, at a public rally on the grounds of the Washington Monument, Watts stated, "[t]hey always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my

"political hyperbole" and not a "true threat" based on a non-exhaustive list of contextual factors. *Id.* at 708. The Court warned that although "[t]he language of the political arena is often vituperative, abusive, and inexact," attempts to criminalize pure speech should be interpreted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . ." *Id.* at 708. Thus, it is imperative that "a threat be distinguished from what is constitutionally protected speech." *Id.* at 707.

That same year, this Court issued another per curiam First Amendment opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that case, the Court dealt with the categorical exception "incitement to violence" in the context of the Ohio Criminal Syndicalism statute, which criminalized, in part, "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 445. Notably, in *Brandenburg* this Court explained that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy *is directed to inciting or*

(continued...)

physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J. They are not going to make me kill my black brothers." *Watts*, 394 U.S. at 706.

producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447 (emphasis added). The Court drew a distinction between "abstract teaching" of the "moral propriety or even moral necessity for a resort to force and violence," and "preparing a group for violent action." *Id.* at 448. As the Court noted, a statute that fails to draw the distinction between speech and incitement to violence "sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id.*

Then, in *Claiborne Hardware*, the Court emphatically reiterated that political speech needs broad protection—even speech that some may perceive as threatening. In that case, the Court required that "an individual h[o]ld a specific intent to further" illegal conduct before his or her speech is excepted because, in "this sensitive field" of First Amendment rights, "the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 458 U.S. at 920 (internal quotations omitted). Again, this Court demonstrated that the "true threats" exception must be drawn narrowly.

Subsequent cases addressing the "true threats" exception have only confirmed this narrow scope first outlined by this Court in *Watts*, *Brandenburg*, and *Claiborne Hardware*. For example, in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), while this Court stated that "threats to patients or their families, however communicated, are proscribable under the First Amendment," *id.* at 773, it declined to decide whether the anti-abortion posters at issue

were "true threats," since they could be avoided if the clinic merely "pull[ed] its curtains." *Id.* Notably, however, the Court struck down the portion of the injunction that prohibited all "images observable" because it "burden[ed] more speech than necessary to achieve the purpose of limiting threats to clinic patients." *Id.* The Court also struck down the bar prohibiting anyone from speaking to a person seeking services of a clinic within 300 feet of the clinic, because "[a]bsent evidence that the protesters' speech is independently proscribable (*i.e.*, 'fighting words' or threats), this provision cannot stand." *Id.* at 774. *Madsen* indicates that the "true threats" exception—like the other categorical exceptions for obscenity or fighting words—is a "narrowly limited class[] of speech." *Chaplinsky*, 315 U.S. at 571.

Likewise, in *R.A.V.*, this Court struck down an ordinance prohibiting "cross burning" or placing a "Nazi swastika" or other symbol or object "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color creed, religion or gender," 505 U.S. at 380, because the ordinance "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresse[d]," *id.* at 381. Again emphasizing the narrowness and viewpoint-neutrality of the "true threats" exception, this Court explained:

> the Federal Government can [for example] criminalize only those threats of violence that are directed against the President since the reasons why threats of violence are outside the First Amendment (protecting

> individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.

Id. at 388 (citing *Watts*, 394 U.S. at 707). But the Court warned that "the Federal Government may not criminalize . . . threats against the President that [merely] mention his policy on aid to inner cities." *Id.* at 388. To do so would unconstitutionally criminalize speech based on viewpoint.

Finally, in *Virginia v. Black*, 538 U.S. 343 (2003), this Court's most recent word on "true threats," it held that a Virginia statute prohibiting cross burning with the intent to intimidate passed constitutional muster since it banned intentional conduct rather than mere expression. The Court explained that "'[t]rue threats' encompass those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 360 (emphasis added). To be clear, the Court reiterated: "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear of bodily harm or death.*" *Id.* (emphasis added). In other words, since the statute required a showing of subjective intent, it was not unconstitutional on its face.

A plurality of the Court, however, struck down a provision specifying that any cross burning was

prima facie evidence of intent to intimidate. The plurality reasoned:

> the prima facie provision strips away the very reason why a State may ban cross burning *with the intent to intimidate*. The prima facie evidence provision permits a jury to convict in every cross-burning case . . . The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

Id. at 365 (emphasis added). The plurality reasoned that effectively writing the subjective intent element out of the statute "would create an unacceptable risk of the suppression of ideas" since the act of burning a cross may "mean only that the person is engaged in core political speech." *Id.* Thus, *Black* is this Court's clearest articulation of the need for proof of subjective intent to threaten in a criminal threats case.

Which brings us to *Elonis*. Here, the Third Circuit's judgment—which concluded that an individual could be convicted under 18 U.S.C. § 875(c) upon only a "reasonable person's" view of what constitutes threatening speech—simply cannot be squared with this Court's jurisprudence requiring that First Amendment exceptions (and especially that for "true threats") be narrowly drawn. *See, e.g.*, *Chaplinsky*, 315 U.S. at 571-72. Indeed, requiring only an objective test would sweep any statement by a political protestor (like Charles Evers) reasonably *perceived* as threatening—likely by a member of the majority on a controversial political issue—outside of

the protective realm of the First Amendment. Justice Marshall rightly noted the danger of a broad threats exception in his concurrence in *Rogers v. United States*, 422 U.S. 35 (1975), a case dealing with a prosecution under 18 U.S.C. § 871 for threatening the President,

> [u]nder the objective construction the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. charging the defendant with the responsibility for the effect of his statements on his listeners. [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech."

Id. at 47. For similar reasons, applying the "true threats" exception to such a wide swath of speech is also contrary to this Court's caselaw requiring "precision of regulation." *See Claiborne Hardware*, 458 U.S. at 916. Therefore, a subjective component to the statute is required because "[i]n this nebulous area of hybrid activity, composed of both protected and unprotected activity, lurks the potential for the abrogation of protected freedoms in the name of reaching unprotected behavior." *See* Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 743 (1999). Since requiring only an objective determination would place speech that has been traditionally protected beyond the reach of the First Amendment,

the criminal statute would be imprecise and overly broad.

Finally, the chilling effect on political protest that would likely result from an objective-only statutory standard is also contrary to this Court's cases protecting even the most "vituperative, abusive, and inexact," language "of the political arena." *Watts*, 394 U.S. at 708. Where this Court has stated that "debate on public issues should be uninhibited" and "robust," *id.*, an objective-only requirement will "necessarily lead to self-censorship by speakers or actors, who are forced to guess where the line between protected and unprotected speech or expressive conduct will be drawn," *see* Blakey & Murray, *supra* at 1063. This Court explained the concern with chilling speech in *Virginia v. Hicks*, 539 U.S. 113 (2003):

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."

Id. at 119 (internal citations omitted). The statute at issue should not be read to allow interference with the "uninhibited marketplace of ideas." *Id.*

In short, without requiring proof of a subjective intent to threaten in order to convict under 18 U.S.C. § 875(c), "protestors will necessarily lack the ability to gauge accurately the extent to which a 'context'

created by others will be taken into account—well after the fact—by a court or a jury in evaluating their speech or expressive conduct." Blakey & Murray, *supra* at 1064. Therefore, "protestors who *should be protected by the First Amendment* will be inevitably and justifiably afraid of crossing the murky line between vociferous protest into the areas of 'true threat.'" *Id.* A subjective intent component is necessary to comport with this Court's jurisprudence and to assure that political protest—vital to the history and tradition of this country—is not chilled or silenced altogether.

II. REQUIRING PROOF OF A SUBJECTIVE INTENT TO THREATEN FOR CONVICTION UNDER 18 U.S.C. § 875(C) IS ALSO COMPELLED BY BEDROCK PRINCIPLES OF FEDERAL CRIMINAL LAW

Federal criminal law is modeled after the common law, which treated crime as "a compound concept, generally constituted only from concurrence of an evil meaning mind [and] an evil-doing hand." *See Morrissette v. United States*, 342 U.S. 246, 251 (1952). William Blackstone described the common law conception of crime this way:

> [A]s a vitious [sic] will without a vitious act is no civil crime, so, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.

WILLIAM BLACKSTONE, COMMENTARIES *21.

With the common law as a guide, federal criminal offenses generally prescribe both an action and a related state of mind. Three states of mind are typically found in federal criminal statutes: "'intent' (purpose), 'knowledge' (conscious awareness), 'recklessness' (conscious risk taking)" and in some cases "negligence may also be a lesser form of state of mind," but it presents "conceptual difficulties." *See* Blakey & Murray, *supra* at 1045; *see also, e.g., United States v. U.S. Gypsum*, 438 U.S. 422, 444 (1978) (finding that "concepts of recklessness and negligence have no place" in liability for antitrust offenses). Generally, courts will "presume a scienter requirement" for each element of a criminal offense. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71-73 (1994) ("*Morissette* instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.").

Indeed, even silence as to the state of mind of a particular element of a statute does not mean that no *mens rea* is required. Given that federal criminal law is rooted in the common law, strict liability offenses are the exception, not the rule. *See U.S. Gypsum Co.*, 438 U.S. at 437-38. Where a statute is ambiguous as to state of mind, the general rule imposed by this Court is that proof of "knowledge" is required as to conduct, *United States v. Bailey*, 444 U.S. 394, 408 (1980) ("[T]he cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to

support a conviction."), and "knowledge" is required as to factual circumstances if they establish liability, *see Staples v. United States*, 511 U.S. 600, 615-16 (1994). In certain classes of cases, however, "heightened culpability has been thought to merit special attention." *Bailey*, 444 U.S. at 405.

Since the common law "disfavored" strict liability offenses, without any evidence that Congress intended to override that rule, some finding of scienter is required for conviction under 18 U.S.C. § 875(c). *See U.S. Gypsum*, 438 U.S. at 438 ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."). And this Court has articulated the general rule that "knowledge" is the *minimum* required as to a desired result (here, fear or disruption) when the statute is otherwise silent. *See Morrissette*, 342 U.S. at 252 (requiring that a "scienter" must be read into common law-type statutes silent as to state of mind); *Bailey*, 444 U.S. at 408 (reiterating that knowledge is required for statutes lacking state of mind); *U.S. Gypsum*, 438 U.S. at 444 n.21 (requiring knowledge as to result). Requiring an objective-only ("reasonable person" or "negligence") standard to convict under 18 U.S.C. § 875(c), instead of the baseline "knowledge" standard, ignores these traditional notions of criminal law. *See, e.g.*, *Rogers*, 422 U.S. at 47 (Marshall, J., concurring) (describing an "objective interpretation" of what is a threat as a "negligence standard, charging the defendant with responsibility for the *effect of his statements on his listeners*"

(emphasis added)). Thus, the objective-only standard adhered to by the Third Circuit below is insufficient to convict an individual under the statute as a matter of well-established criminal law.

Indeed, here, basic notions of criminal justice cry out at least for a scienter requirement. But as this Court noted in *Bailey*, "heightened culpability has been thought to merit special attention" in certain cases. 444 U.S. at 405. This is just such a case. The answer to the "why purpose/intent" question lies in the unique and personal nature of First Amendment rights. *See supra* Section I. A "subjective intent, or purpose, requirement serves to protect listeners from either fear or disruption while at the same time permitting a *maximum amount of free speech*—speech that will be, in fact, largely free from the self-censorship[.]" *See* Blakey & Murray, *supra* at 1067 (emphasis added). As Justice Marshall explained in his *Rogers* concurrence, in the "sensitive area" of First Amendment rights, an overly stringent "degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." 422 U.S. at 47-48 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). A mere knowledge requirement would be overly restrictive in this "sensitive area" of First Amendment rights. Thus, the correct formulation of 18 U.S.C. § 875(c) requires proof of subjective intent to threaten, which comports with traditional notions of federal criminal law and protects more speech than an objective ("negligence") requirement, or a knowledge ("general intent") standard.

CONCLUSION

This case implicates the most basic American freedom—the right to openly oppose government policies or to advocate for change, and to encourage others to follow suit. For the reasons described above, this Court's First Amendment jurisprudence, as well as bedrock principles of federal criminal law, require proof of subjective intent to threaten in order to convict under 18 U.S.C. § 875(c). To require only an objective ("reasonable person" or "negligence") standard would allow those who seek to squelch political protest to use the statute as a sword, silencing those who disagree with their opinions or policies. Thus, an objective-only test would run contrary to this Court's charge, in the context of the First Amendment, to interpret statutory language "against the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Watts*, 394 U.S. at 708.

Amici respectfully request that this Court rule in favor of Mr. Elonis and adhere to its precedent by protecting political speech, which is, indeed, "at the core of what the First Amendment is designed to protect." *Black*, 538 U.S. at 365.

Respectfully submitted,

THOMAS BREJCHA
PETER BREEN
THOMAS MORE SOCIETY
19 South LaSalle St., Ste. 603
Chicago, Illinois 60603
(312) 782-1680

BRIAN J. MURRAY
Counsel of Record
MEGHAN E. SWEENEY
JONES DAY
77 W. Wacker, Ste. 3500
Chicago, Illinois 60601
(312) 782-3939
bjmurray@jonesday.com

Counsel for Amici Curiae

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AMICUS CURIAE BRIEF

No. 13-983

IN THE
Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND NINE MEDIA ORGANIZATIONS, IN SUPPORT OF PETITIONER

Bruce D. Brown
Counsel of Record
Gregg P. Leslie
Emily R. Grannis
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
bbrown@rcfp.org
(703) 807-2100

(Additional counsel for amici listed in Appendix B)

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STATEMENT OF INTEREST[1]

Amici curiae, described fully in Appendix A, are The Reporters Committee for Freedom of the Press, Advance Publications, Inc., Association of Alternative Newsmedia, First Look Media, Freedom of the Press Foundation, Investigative Reporting Workshop at American University, National Press Photographers Association, Newspaper Association of America, The Newspaper Guild - CWA, and Tully Center for Free Speech.

This case concerns a topic that has a direct impact on the news media. Although journalists should not face the possibility of prosecution for fulfilling their role of informing the public and providing commentary and analysis on current issues, they have faced just such inquiries in the past in true threats cases. The government's practice of erroneously relying on an objective intent test for true threats offenses to support investigations into editorials, cartoons, and commentary must come to an end because it infringes on journalists' First Amendment freedoms.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

As advocates for the rights of the news media who gather and disseminate information and commentary to the public, *amici* have a strong interest in ensuring that journalists retain their full range of First Amendment protections, including the right to comment on matters of public concern without the fear of facing government sanction.

Amici call for this Court to reject the objective intent test for true threats crimes. If that standard survives, it will open the door to more investigations and prosecutions of journalists for speech that clearly does not constitute a real expression of an intent to threaten harm to another person. Leaving members of the news media to guess at what a reader or listener might take seriously is likely to lead to a chilling effect as journalists choose to hold back their opinions or a controversial quote, or censor a letter to the editor, out of fear that they could be held responsible for a reader or listener's overreaction. Thus, *amici* respectfully request that this Court reverse the decision below.

SUMMARY OF ARGUMENT

Journalists and news media organizations are active and lively participants in public discourse, but they draw particular attention when their coverage deals with controversial ideas or statements. Often, fully addressing such an issue requires a journalist to offer analysis, quote outspoken sources, or comment for themselves. Such activities are protected under the First Amendment, but this Court risks eroding that protection if it adopts an objective intent test for analysis of true threats.

Public commentary is frequently meant to provoke – whether by urging listeners to rethink their position on an issue or to take action – and this country has a long history of protecting provocative speech. Recent instances of federal investigations into journalists for clearly legitimate activities point to the need to establish a true threats test that will protect typical reporting and news gathering activities. A subjective analysis is necessary to shield satirists, cartoonists, and commentators expressing their own views, and even reporters who faithfully relay only what other people say.

This Court's decision in *Virginia v. Black* points to the need for a subjective intent test in all true threats cases. In *Black*, the Court recognized the danger to First Amendment principles if a speaker's intent may be assumed simply from a listener's reaction, holding that burning a cross by itself could not be sufficient prima facie evidence of intent to threaten. But even if the ruling in *Black* does not require the application of a subjective test in every

true threats case, the First Amendment necessitates that the Court adopt such a standard now.

This Court should be mindful of the effects its decision in this case could have on journalists participating in protected activities under the First Amendment. A subjective intent test will continue to catch truly threatening statements while leaving the maximum space for protected speech to thrive.

ARGUMENT

Americans have long held the right to comment and criticize people publicly, including both "informed and responsible criticism" and "the freedom to speak foolishly and without moderation." *Baumgartner v. U.S.*, 322 U.S. 665, 673-674 (1944). It is fundamental to the First Amendment that even the most imprudent of speech be granted as much leeway as possible and any government attempts to restrict speech be narrowly tailored to that goal. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) (stating that "[t]he hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting"); *see also* G. Robert Blakey and Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. Rev. 829, 1072-1073 (2002) (noting that "in a society where freedom of speech is a core value, the price to pay is small; errors should always be on the side of free speech or expressive conduct").

Journalists and members of the news media have long counted on a generous reading of First

Amendment freedoms in order to both report objectively on events and to provide commentary to add to public discussion of current issues:

> America has enjoyed a proud history of political satire and political cartooning, dating to pre-Revolutionary War days. Furthermore, it is a fundamental principle that the First Amendment protects the right to engage in debate on public issues and public figures, which is vehement, caustic and which, at times, subjects public figures to ridicule and unpleasantly sharp attacks.

Lauren Gilbert, *Mocking George: Political Satire as 'True Threat' in the Age of Global Terrorism*, 58 U. Miami L. Rev. 843, 855 (2004).

This Court has specifically recognized the importance of ensuring the First Amendment leaves room for parody and satire, despite the often "caustic" and arguably "outrageous" nature of much of this type of commentary. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-55 (1988) (recognizing that "despite their sometimes caustic nature," satirical commentaries "have undoubtedly had an effect on the course and outcome of contemporaneous debate"). In fact, satire and commentaries in that vein are designed to embarrass and expose, often through mockery. Gilbert, *supra*, at 858; *see also Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C. Cir. 2013) (pointing out that "it is the nature of satire that not everyone 'gets it' immediately"). As this Court has seen, it can be difficult to distinguish these forms of acceptable

ridicule from expression that does not receive the same First Amendment protections. "Various doctrinal protections," including defamation and incitement "preserve 'the breathing space which freedoms of expression require in order to survive.' " *Farah*, 736 F.3d at 534 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)). The true threat doctrine should be no different.

Given the proliferation of harsh commentary in today's media landscape, itself a reflection of a fractured and divided public, particularly in the political arena, it is particularly important that this Court draw a very clear line between allowable parody, satire and exaggeration, and punishable true threats. *Amici* believe a subjective intent test is crucial to establishing that line.

I. This Court's decision in *Black* suggests that a subjective intent analysis is constitutionally warranted for true threat statutes.

In *Virginia v. Black*, this Court defined "true threats" to be "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. In *Black*, this Court examined a Virginia statute banning cross burning with the intent to intimidate someone. The statute allowed juries to assume that the act of burning the cross was sufficient evidence of intent to intimidate. This Court held otherwise, recognizing that the same act could be either "constitutionally proscribable

intimidation" or, on the other hand, could be indicative "only that the person is engaged in core political speech." *Id.* at 365. The Court held that allowing a jury to infer an unlawful intent from an ambiguous act violated the First Amendment. The subjective intent requirement was necessary to keep the statute from becoming overbroad and restricting constitutionally-protected speech.

The Third Circuit below decided that the language of *Black* did not overturn the circuit's case law requiring only the negligence standard of the objective "reasonable person" test, because *Black* dealt with a statute that had a subjective intent requirement and the holding did not extend more broadly than that. *U.S. v. Elonis*, 730 F.3d 321, 329 (3d Cir. 2013). The court, first quoting the standard from *Black*, held that

> we read "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to mean that the speaker must intend to make the communication. It would require adding language the Court did not write to read the passage as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence."

Id. But the difference between "means to communicate" and "intends the statement to be understood as" seems like a distinction without a difference; either way, this Court in *Black* wanted to

avoid a negligence standard by ensuring that there was an intent to make a true threat. The Ninth Circuit better understood the meaning of *Black*, when it recognized that the Court wanted to allow for expansive First Amendment protections and only minimal restrictions. That circuit has read *Black* to require a subjective intent test in all true threats cases, which serves to best protect the interest of news media outlets and their representatives. *See U.S. v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (holding "that only intentional threats are criminally punishable consistently with the First Amendment [. . .] A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim"). Although there were four opinions for this Court in *Black*, the Ninth Circuit correctly points out that "[e]ight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction." *Id.* at 632-633.

The Seventh Circuit has also allowed for the application of a subjective intent test. Although the circuit has not had the opportunity to address the issue directly, dicta indicates its skepticism of an objective true threats test post-*Black*:

> It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality's discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable.

U.S. v. Parr, 545 F.3d 491, 500 (7th Cir. 2008). An objective test is untenable given the long-standing First Amendment protection for hyperbole and caustic commentary.

Other circuits that have addressed this question have largely found *Black* to be limited to the Virginia statute at issue in 2003 and have not adopted subjective intent tests. *U.S. v. Jeffries*, 692 F.3d 473, 480-481 (6th Cir. 2012). This misreads *Black* and is an unnecessarily limited approach.

Like the statute in *Black*, the statute at issue here, 18 U.S.C. § 875(c) prohibits sending a threatening message, this time proscribing the "transmi[ssion] in interstate commerce" of "any threat to injure the person of another." The Third Circuit has read *Black* to mean that a speaker need only intend to transmit a message – any message – in order to satisfy the mens rea requirement for § 875(c). But *Black* is not as limited as the Third Circuit believes.

It is impossible to imagine, in light of this Court's well-established commitment to First Amendment protections, that the intent requirement imposed in *Black* was meant to be limited to an intent merely to communicate, rather than an intent that one's message be understood in a threatening way.

II. Even if *Black* did not mandate a subjective intent test in all true threats cases, the Court should recognize one here.

First Amendment interests require granting as much leeway as possible for speakers to express themselves, and true threat cases are no exception to this well-established law. A subjective intent test would not relieve truly dangerous people of responsibility for their statements; rather, it would leave room for more commentary in the public sphere. Though such dialogue might be acerbic, it still merits as much protection as the First Amendment can offer.

Representatives of the news media are particularly concerned about the intersection of true threats jurisprudence and protected commentary and satire. "[T]he purpose of satire and parody often is to make the object of the satire suffer, whether through the hostility that the satire produces in the minds of the reader or more directly, through the target's own awareness of the assault made upon him or her." Gilbert, *supra*, at 860. Threatening language generally has the same tendency to "make the object [. . .] suffer," and can similarly do so directly or indirectly.

A subjective intent test for true threats is consistent with First Amendment precedent. An objective test in true threats cases, on the other hand, is essentially the kind of penalty for speech that that has been repeatedly rejected in other areas of First Amendment jurisprudence:

> [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech [. . .] I would therefore interpret [the statute] to require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out.

Rogers v. U.S., 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring) (interpreting 18 U.S.C. § 871, which addresses threats against the president).

In fact, three terms ago, when this Court considered criminal liability for speech when no injury occurred, it concluded that false speech cannot automatically be considered fraudulent. *U.S. v. Alvarez*, 132 S.Ct. 2537, 2547 (2012) (invaliding the Stolen Valor Act and stating "[w]ere the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases"). Nor in the area of defamation of a public official or pubic figure, another form of unprotected speech, does the Court employ so low a standard for determining liability, requiring knowledge of falsity or reckless disregard for the truth before a claim may be actionable. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

Similarly, incitement, another unprotected area of speech, requires the subjective intent of "advocacy [that] is directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444,

447 (1969). Only after that subjective test is satisfied do judges and juries turn to the objective question of whether the speech "is likely to incite or produce such [imminent lawless] action." *Id.*

More recently, this Court reiterated the limits on the government's power to restrict speech based on a listener's feelings. *See Snyder v. Phelps*, 131 S.Ct. 1207, 1220 (2011) (quoting *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780 (1971) (holding that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner")). A subjective intent test for true threat statutes is necessary to maintain those clear limits on government power.

At least one court has also found higher intent requirements necessary even in the face of national security concerns. A federal district court ruled in an espionage case brought against two civilians that the First Amendment checked the government's power to pursue individuals who had made no pledges to the government to protect state secrets. In these heightened cases, prosecutors had to prove that the speaker was subjectively aware that conveying information could potentially harm the United States – and intended to bring about that result. *See U.S. v. Rosen*, 445 F.Supp.2d 602, n. 56 (E.D.Va. 2006) (noting that "the additional scienter requirement . . . is not superfluous because it relates not to the nature of the information, but to the subjective

understanding of the defendant as to the possible effect of the disclosure").

Black is certainly instructive in this case and should be read to require a subjective intent test for all true threats cases. However, because this Court's general First Amendment jurisprudence points to the need for more than a negligence standard when it comes to the *mens rea* for crimes relating to expression, a reading of *Black* that does not call for a subjective test does not end the discussion. Regardless of how broadly or narrowly this Court reads its decision in *Black*, it should still adopt a subjective intent test for true threat crimes to remain consistent with other First Amendment precedents.

III. Media outlets and journalists need the freedom to engage fully in news coverage and commentary without the fear of a threats prosecution.

Adopting a purely objective test to evaluate true threats risks infringing on the First Amendment rights of journalists and media representatives to comment on issues of public concern. Under the current framework, reporters, editors and photographers have been subject to specious investigations on the theory that their work represents a real threat of physical harm to another person. These investigations have been widely criticized, but the fact that they continue reinforces the need for this Court to make clear that prosecution under a threat statute requires proof of a subjective intent to threaten.

A. Journalists interjecting their own commentary into the public sphere need protection from true threat statutes.

Although journalists are obviously not in the business of threatening people, statements that deserve First Amendment protection have come under fire in recent years as journalists have been accused of making true threats instead of legitimate commentary.

In 2001, the editor of the student newspaper at SUNY-Stony Brook wrote an editorial with the headline, "Editorial: Dear Jesus Christ, King of Kings, All I Ask Is That You Smite George W. Bush." Gilbert, *supra*, at 848. The editorial asked Jesus to "claim the life" of then-President Bush and several members of his administration, adding that it would be fine if Jesus sent "some crazy mortal" to do the job. *Id.* There can be little doubt that the editor's statement posed no real risk to the president. Nevertheless, both the university police and the Secret Service investigated, appearing at the newspaper's offices and taking the editor into custody. *Id.* at 849. Law enforcement had the editor sign waivers for the search of his home and the review of his medical records. He was not offered an attorney. *Letter from Reporters Committee for the Freedom of the Press, to Brian Stafford, Director, U.S. Secret Service* (Feb. 15, 2001), *available at* http://www.rcfp.org/news/documents/ssprotest.pdf. "[The editor] was told by Secret Service agents that his editorial was not protected by the First Amendment and that charges could be filed against

him." *Id.* The editor reported that remaining newspapers disappeared from racks on campus and from the newspaper's loading dock. Gilbert, *supra*, at 849. The Secret Service continued to defend its actions as necessary to counter a real threat. *Id.* All this despite the fact that "[t]he editorial was clearly a form of satire and political hyperbole." Letter from the Reporters Committee.

In an even more egregious example of targeting journalists for protected speech, the Secret Service visited *The Los Angeles Times* in July 2003 after an editorial cartoonist for the paper published a cartoon based on a Pulitzer-Prize winning photo taken during the Vietnam War. The original photo showed a South Vietnamese general executing a Viet Cong prisoner in the street. The cartoon depicted a character aiming a gun at the head of President George W. Bush. The executioner's uniform said "Politics" and the cartoon was set in Iraq. Gilbert, *supra*, at 849-850. The Secret Service's reaction was ironic given the cartoonist's intent, which he later said was "to condemn those persons who sought to use the current situation in Iraq to assassinate the President's character." *Id.* The agency's actions were so outrageous that Rep. Christopher Cox, chairman of the House Homeland Security Committee, said the Secret Service owed the cartoonist an apology for its "profoundly bad judgment." *Lawmaker: Questioning of Cartoonist Wrong*, A.P. (July 23, 2003), *available at* http://www.editorandpublisher.com/PrintArticle/Lawmaker-Questioning-of-Cartoonist-Wrong.

These journalists were all expressing themselves on matters of public concern in a way that should be fully protected by the First Amendment. The fact that there is any question as to whether they could be prosecuted under a true threats regime demonstrates how crucial it is that a finder of fact be required to consider the speaker's subjective intent in determining whether their speech is truly unprotected.

B. Journalists who may quote or republish threatening material need protection from true threat statutes.

It is not only when journalists speak for themselves that they are at risk for true threats charges. In fact, as with many areas of First Amendment jurisprudence, there is the fear that members of the news media may be held responsible simply from republishing or linking to certain material.

In 2003, the *Tucson Citizen* published a letter to the editor that stated, "Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter." *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 515, 115 P.3d 107 (2005). A Muslim couple in the newspaper's distribution area sued the newspaper for assault and intentional infliction of emotional distress. The trial court refused to dismiss the emotional distress claim on the theory that the letter could be read as a true threat. *Id.* The Arizona Supreme Court took an appeal at that stage and dismissed the claim, but it

did so on an objective standard, holding that "[g]iven the letter's conditional nature and ambiguity," it could not be considered a true threat. *Id.* at 521. This of course begs the question of whether a more concrete and less conditional threat might have resulted in liability for the newspaper, and thus demonstrates the need for clarity from this Court that a subjective standard in true threats cases is constitutionally required.

To take another example, in 2010, a reporter for *The Times Tribune* in Scranton, Pennsylvania, quoted U.S. Rep. Paul Kanjorski talking about then-Florida gubernatorial candidate Rick Scott. Kanjorski said of Scott, "Instead of running for governor of Florida, they ought to have him and shoot him. Put him against the wall and shoot him." Roderick Random, *Kanjorski Ponders 'Nuts,' Bolts from Blue*, The Times-Tribune (Oct. 23, 2010), *available at* http://thetimes-tribune.com/opinion/editorials-columns/roderick-random/kanjorski-ponders-nuts-bolts-from-blue-1.1052739. Kanjorski's statements are similar to many that courts have found to be true threats, or that could at least arguably be considered a true threat under an objective analysis. The concern of *amici* is that the reporter could also be held liable under an objective threat statute simply for publishing the quote. In fact, if a speaker's intent to threaten is irrelevant, any publisher could be as easily held to account as the original speaker. This Court should avoid that result.

Speakers often face challenges to their First Amendment rights, including claims that they have

entered a territory where their expression is no longer protected. A subjective intent test that examines whether a speaker meant his or her statement to be threatening is necessary to ensure the broad protections the First Amendment requires.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision below.

Respectfully submitted,

Bruce D. Brown
Counsel of Record
Gregg P. Leslie
Emily R. Grannis
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
bbrown@rcfp.org
(703) 807-2100

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of

more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B

Additional *amici* counsel:

Richard A. Bernstein
Sabin, Bermant & Gould LLP
4 Times Square, 23rd Floor
New York, NY 10036
Counsel for Advance Publications, Inc.

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for Association of Alternative Newsmedia

Lynn Oberlander
General Counsel, Media Operations
First Look Media, Inc.
162 Fifth Avenue
8th Floor
New York, New York 10010
(347)-453-8111

Marcia Hofmann
25 Taylor Street
San Francisco, CA 94012
Counsel for Freedom of the Press Foundation

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
Counsel for National Press Photographers Association

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for the Newspaper Association of America

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW
Suite 712
Washington, DC 20036
Counsel for The Newspaper Guild – CWA

AMICUS CURIAE BRIEF

No. 13-983

In The Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

John W. Whitehead
Counsel of Record
Douglas R. McKusick
Jesse H. Baker IV
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

(1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and

(2) Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)[2], and *Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the right to be free to engage in protected speech activity under the First Amendment without fear of prosecution.

SUMMARY OF THE ARGUMENT

True threats are not protected by the First Amendment because the expectation of violence they

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with this Court consenting to the filing of *amicus curiae* briefs.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for Rutherford Institute as *Amicus Curiae*).

carry can severely disrupt the life of the subject of the threat. The subject of a threat can only have this expectation of violence when a threat is credible. If the subject could reasonably find information suggesting that there was no subjective intent to engage in any conduct related to a speaker's statements, a listener should experience no expectation of violence. The subject might still experience fear, discomfort, or unease, but within the bounds of the First Amendment, courts should be loath to punish causes of fear that are not accompanied by any expectation of violence.

Even after an expectation of violence is established, it is not necessarily the case that such a statement is proscribable. For example, threating statements intended as political or artistic speech are afforded a significant degree of First Amendment protection. If subjective intent is a factor excluded from the determination of a true threat, a fact-finder is required to determine an expectation of violence on the basis of fear, which is an impermissible factor for limiting a constitutionally-protected right. In order to protect the First Amendment rights of speakers, courts must ensure that they are criminalizing more than just the unrealized and unrealizable fears of particularly sensitive listeners. A rule that considers only a listener's response to a perceived threat can easily and unjustly tip the scales against an innocent speaker who may have had no ill intent in making their statement. Meanwhile, if proving a speaker's intent is required, a fact-finder must decide a more objective question of fact: whether or not the purported motive is genuine.

Although there are strong arguments in favor of a subjective intent requirement to prove *mens rea*,

we do not make that argument here. *See generally* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y. 283, 314-319 (2001). Instead, we focus on demonstrating that the use of a subjective test in true threat analysis proves to be the most objective measure for determining whether a threat is a constitutionally-proscribable form of intimidation.

ARGUMENT

I. Preventing Intimidation Is a Legitimate Cause for Abrogating First Amendment Rights; Preventing Fear Is Not

> We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., *dissenting*).

Holmes' landmark dissent in *Abrams* demonstrates that only clearly-articulated and imminent harm should justify limiting even speech that we "believe to be fraught with death." First Amendment rights, intended as they are to promote "uninhibited" and "robust" discussion, should only be proscribable upon a showing of significant harm.

"True threats" are excepted from First Amendment protection, but the extent of harm needed to justify this exception has never been completely clear. The exception from protection of true threats arises from the societal interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur", *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

Essential to that formulation is the prepositional clause after "fear;" "fear" and "fear of violence" are two very different things. *Id.* A significant amount of protected speech may cause "fear," but remains protected. Pro-Nazi marchers decked out in full regalia marching through a city center heavily Jewish-populated, and hooded KKK members carrying firearms and promising revenge against minorities, might well create a sense of fear in onlookers, but both of these forms of speech remain protected. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Clearly, fear alone does not give rise to the degree of harm sufficient to abrogate First Amendment rights. The cause of harm that the true threats exception targets is really "the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. 388.

This Court has recently suggested as much. In *Virginia v. Black*, this Court stated that "[t]he act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech." *Virginia v. Black*, 538 U.S. 343, 365 (2003). While both cross burnings would undoubtedly cause fear for some, only in the

former case is the cross burning "intimidation" sufficient to constitute prohibited conduct. It should be clear, then, that true threats are only excepted from First Amendment protection due to their capacity to intimidate, not due to their potential to create fear in a recipient listener.

II. A Threat Is Only Intimidating If It Is Credible

"Fear of violence" should only occur if there is a reasonable expectation of violence to be feared. The courts are generally agreed on this principle. Where they differ is on the importance of subjective intent as a factor in determining a reasonable expectation of violence. This amicus suggests that the subjective intent of the speaker should be of prime importance in that determination.

Suppose that, upon receiving a threat, the subject of the threat were certain that the speaker had no intention of carrying it out. In this case, there is no reason to expect violence. When, for instance, the speaker is engaging in a comedy routine or political debate, the text and tone of their threat might, lacking context, evoke fear. But knowing that neither of these speakers intends to carry out their threat, there is no reason to expect violence, and so, crucially, no "fear of violence."

In fact, whenever a threat is received, two bodies of contextual information come with it. The first, the basis of the "objective" test, consists of an analysis of the threat itself to find emotional or rhetorical cues that might trigger fear. This includes connotations of certain words in the statement at issue, the conditional nature of the statement, and

the statement's reception. Such a test operates largely in an information vacuum, failing to consider essential contextual information that might affect how the speech is received.

The second test, the "subjective" test, considers information about the speaker and the context in which the speech was communicated. This might include considering the message in its totality, the medium of its communication, and the capacity and proclivity of the speaker to carry out the message's objective.

To satisfy an "objective" test, a fact-finder need only determine that a reasonable person receiving the threating statement, without considering the second body of information, would be afraid. However, in reality, just by virtue of being a "listener" in a given exchange, every "listener" is exposed to this second body of information that provides the essential context for evaluating a statement. If that information would reasonably change their opinion of the threat, there is no reason to exclude that information, as the "objective" test does.

Moreover, even if the "objective" test is satisfied, and the subject of the threat can be reasonably expected to feel fear, that does not mean that they can reasonably expect violence. It is only the "subjective" test that determines the probability of violence, and therefore only the "subjective" test that can establish an expectation of violence.

Importantly, we do not suggest that the subject of the threat should be expected to perfectly understand the state of mind of the speaker. What we assert is that at least some of the second body of

information is communicated alongside the threat; that information should be used to construct probable intent. After all, if the subject has or could reasonably be expected to get information that suggests that a speaker has no intention of carrying out the threat, there should be no expectation of violence.

For example, if a listener could reasonably discover that the speaker purchased a rifle shortly after threatening to shoot the listener, it would be reasonable to assume that the speaker, now having the means to carry out the threat, could intend to actually do so. Conversely, if the subject could reasonably discover that the threat was part of a comedy sketch routine, or was a flippant statement made in jest, it would be reasonable to assume that the speaker did not intend to carry out the threat. The extent of information that we should expect a listener to know or find out is case-specific, but almost certainly includes the overall purpose of the statement made, the medium of communication, whether the statement is quoting or parodying a popular source, and any known facts about the speaker or the circumstances in which the threatening statement was made.

As proof of concept, the 8th and 9th Circuits have determined that certain facts about the state of mind and intentions of the speaker must be included in the determination of a true threat. In *United States v. Barcley*, 452 F.2d 930, 933 (8th Cir. 1971), the 8th Circuit ruled that "language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening" is not a true threat unless there is "evidence serving to remove that ambiguity." This is because, in the case where the

nonthreatening meaning is intended, there can be no expectation of violence. Of particular note in this case is that the accuser is rightly responsible for proving the speaker's intent.

Similarly, in *United States v. Frederickson*, 601 F.2d 1358 (8th Cir. 1979), the 8th Circuit determined that the statement, "Well, as soon as my toys get here I will eliminate all the pigs from the president on down" was considered "no more than a crude method of expressing antagonism towards the arresting officers and law enforcement figures generally," and therefore not a true threat. Using this standard, Elonis' state of mind – one of merely "expressing antagonism" and not one of a serious intention to follow through with his supposed claims to employ violence – matters.

Additionally, and particularly instructive for Elonis, the 9th Circuit has ruled that "plaintiffs may be unreasonable in fearing severe threats of physical retaliation because they are made via the internet." *Doe v. Kamehameha Sch./Brn. Pauahi*, 625 F.3d 1182, 1190 (9th Cir. 2010). The court has rightfully made such a determination, acknowledging that the very nature of the internet as an open and unrestricted medium for communication, provides fertile ground for overstatement and hyperbole, and that a significant number of statements that would be considered "threatening" in face-to-face interactions, are not taken as seriously when made on the internet. Such an understanding – that threatening statements made on the internet do not necessarily imply any actual intent to carry out a violent act – more accurately represents the reality of the internet as a communication medium.

This is particularly true on a "social networking" medium like Facebook, where people who insult, threaten, exaggerate, pontificate or use other extreme rhetoric are given "likes," and where hyperbole is generally rewarded. Just as a comedian who is applauded for making progressively more threatening statements will continue upping the ante, so too will a Facebook user whose threatening comments are "liked" feel inclined to continue posting increasingly radical rhetoric.

In the cases cited above, a subject who ignores the body of information pertaining to the state of mind of the speaker, in other words a subject who applies the "objective" test, might feel fear even though there is no expectation of violence. First, it would be reasonable, albeit unfair, to always view comments directed at individuals in the worst possible light. Without considering the intentions of the speaker, then, a comment having two plausible meanings could be assumed to be threatening, unjustifiably punishing a speaker for the listener's decision to interpret the speaker's speech a certain way. Moreover, this assumption would prevail even if a cursory review of the intentions of the speaker suggested that the non-threatening meaning was the one intended, and so no expectation of violence existed.

As a second example, in the *Frederickson* case as the 8th Circuit astutely recognized, the probability that a suspect would attack all police officers and the President while in custody was negligible. The arresting officer could not expect violence because upon arrest he would have personally determined that Frederickson had no means to carry out his threat. However, under an

"objective" test, a fact-finder could ignore the lack of an expectation of violence and convict based only on the clear rhetoric of the statement itself. This effectively criminalizes expressions of antagonism, especially towards law enforcement. Only a "subjective" test, considering the intention of the speaker to carry out a violent act, can prevent non-proscribable threats, from being prosecuted.

Third, the subject of an internet threat using an "objective" test could disregard the general lack of seriousness on the internet even if it was communicated in an environment where extreme comments are made for the purpose of arousing controversy, but are generally understood not to be taken seriously. Unless a "subjective" test is applied, and the body of information pertaining to the state of mind of the speaker is included in the analysis, the lack of a reasonable expectation of violence would, in principle, be irrelevant.

III. Politically-Motivated Speech that Intimidates Is Not Necessarily "Threatening" Speech

Due to the nature and intentions of the First Amendment, core political speech "occupies the highest, most protected position" in the hierarchy of constitutionally-protected speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). *See also Burson v. Freeman*, 504 U.S. 191, 217 (1992). ("The statute directly regulates political expression and thus implicates a core concern of the First Amendment"). Just as political messages are strongly protected by the First

Amendment, so too is political hyperbole, even when it includes a threat. *Watts v. United States*, 394 U.S. 705, 708 (1969). Even though Watts arguably threatened the President by saying that "the first man I want to get in my sights is L.B.J.," the fact that his statement was made during a political rally suggested that it was first and foremost a political message, and that the threat was merely use of rhetoric. *Id.* at 706. Once it was established that his message overall was intended as political speech, it was granted significant protection despite its abusive nature. This Court found that "[t]he language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact," ultimately agreeing that Watts's "only offense here was a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708 (Internal citation omitted).

Based on this Court's statements in *Watts*, political messages that are "vituperative, abusive, and inexact" are still political messages deserving of First Amendment protections no less than more sterile political speech. Thus, the medium of communication and the setting of the speech – both factors in determining the state of mind of the speaker – are necessary considerations in determining whether or not a message is, taken as a whole, political.

Moreover, this enhanced protection for speech intended as political speech goes further than protecting only speech at political rallies:

> Although the petitioner in the present case was not at a political rally or engaged in formal political discussion,

> the same concern [of criminalizing constitutionally protected political speech] counsels against permitting the statute such a broad construction that there is a substantial risk of conviction for a merely crude or careless expression of political enmity.

Rogers v. United States, 422 U.S. 35, 44 (1975) (Marshall, J., concurring).

Later in his concurrence, Justice Marshall acknowledges that using an "objective" test, especially when it comes to "expression of political enmity," is likely to "have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Id.* at 48, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Finally, and most clearly, even threats that do, in fact, intimidate are sometimes protected by the First Amendment when they are intended to be received as political speech:

> To the extent that the court's judgment rests on the ground that "many" black citizens were 'intimidated' by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment.

NAACP v. Claiborne Hardware, 458 U.S. 886, 921 (1982).

In *Claiborne Hardware*, this Court granted constitutional protection to the statement, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," when uttered

by boycott supporters to potential store patrons. *Id.* at 928. Thus, when it comes to speech intended as political speech, even intimidating comments are not necessarily proscribable. In determining the standard for conviction, then, the political intentions of the speaker are of prime importance.

IV. The "Subjective" Intent Test Is a More Objective Standard than a Purely "Objective" Test

In addition to ignoring crucial information about the credibility and motivations of a threat, an "objective" test fails to truly be objective. Fact-finders asked to perform an "objective" test must determine whether a reasonable person would feel afraid. This does not mean that they have to determine that there is a reasonable *cause* for the fear; they must only find that fear could occur. Fear can occur for a variety of reasons independent of the threat or the circumstances of its creation. Stereotypes, prejudices, attribution, association, fear conditioning, and paranoia can all contribute to fear, regardless of whether a comment is actually intimidating. Since a fact-finder is meant to represent the opinion of the average member of society, much of the stereotyping, prejudice, attribution, association, fear conditioning or paranoia that is shared by the majority of a population might covertly serve as an illegitimate basis for a finding of fear. Employing a solely "objective" test institutionalizes these potential prejudices, which validates popular fear-based perceptions and criminalize speech not intended to be threatening.

Indeed, in *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997), a jury convicted the defendant for threatening an FBI agent in a voicemail message saying, "The silver bullets are coming." The FBI agent believed the message constituted a death threat, while the defendant argued that he meant "silver bullets" to describe "a clear-cut simple violation of the law." Fulmer had been providing information to the FBI agent about alleged illegal acts and argued that "silver bullets" meant the crucial evidence needed. On this basis, the jury found that the message contained a true threat. Leigh Noffsinger, Notes & Comments, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 Wash. L. Rev. 1209, 1219 (1999).

Fulmer represents the dangers inherent in applying an objective test. In *Fulmer*, the jury applied an "objective" test to find that the FBI agent reasonably felt fear, despite multiple witnesses attesting to Fulmer's prior use of the term "silver bullet" to mean "a clear-cut simple violation of the law." *Fulmer*, 108 F.3d 1486. This supports the notion that juries, influenced by existing prejudices, are often predisposed to seeing ambiguous statements as threatening even when they are not intended to be so. In *Fulmer* the offending comment was intended to *help* the FBI agent by informing him of critical information for his case. Nonetheless, the jury found against Fulmer mostly on the grounds that the FBI agent, the accuser, found the message "scary," and without adequately considering the context of the statements and the speaker's understanding of his own speech. The blind application of an "objective" test to determine the

probability of fear from the perspective of an accuser unfairly favors any accuser who is able to adequately express fear.

Conversely, a "subjective" test relies not on a determination of fear, but on a determination of probable intent. While certain stereotypes might still plague this test, it is generally easier for a jury to determine whether a speaker is truthful about their intentions—a more fact-based inquiry—than for them to determine whether an individual should or would feel fear in a given circumstance – an evaluation of an individual recipient's emotional state. Since the "subjective" test eliminates difficult-to-define emotional reactions from the fact finder's calculus, the "subjective" test is, between the two, a more objective standard.

CONCLUSION

Both credibility and a lack of political motives are needed to constitutionally proscribe intimidating speech that does not threaten imminent lawlessness. Subjective intent is needed to prove credibility and non-political intentions. In addition, a "subjective" intent test is more objective than an "objective" test. As a result, finders of fact should be required to determine subjective intent as proof of a true threat.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
Jesse H. Baker IV
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, Virginia 22901
(434) 978-3888
Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 13-983

In the Supreme Court of the United States

ANTHONY D. ELONIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF THE STUDENT PRESS LAW CENTER, THE ELECTRONIC FRONTIER FOUNDATION, AND PEN AMERICAN CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

FRANK D. LOMONTE
STUDENT PRESS LAW CENTER
1101 Wilson Blvd.,
Suite 1100
Arlington, VA 22209
(703) 807-1904

DAVID GREENE
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333

SEAN D. JORDAN
Counsel of Record
KENT C. SULLIVAN
PETER LIGH
TRAVIS MOCK
SUTHERLAND ASBILL &
BRENNAN LLP
One American Center
600 Congress, Suite 2000
Austin, TX 78701
sean.jordan@sutherland.com
(512) 721-2679

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

ADDITIONAL COUNSEL:

KATHERINE GLENN BASS
PEN AMERICAN CENTER
588 Broadway, Suite 303
New York, NY 10012
(212) 334-1660

QUESTIONS PRESENTED

It is a federal crime to "transmit[] in interstate or foreign commerce any communication containing * * * any threat to injure the person of another," 18 U.S.C. § 875(c). Numerous states have adopted analogous crimes. The questions presented are:

1. Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

2. Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten; or whether it is enough to show that a "reasonable person" would regard the statement as threatening.

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Ashcroft v. ACLU,
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Bolger v. Youngs Drug Prods. Corp.,
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Brown v. Entm't Merchs. Ass'n,
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Joseph Burstyn v. Wilson,
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New York Times Co. v. Sullivan,
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Reno v. ACLU,
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Rogers v. United States,
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United States v. Elonis,
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United States v. Jeffries,
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cert. denied, 134 S. Ct. 59 (2013).....25

United States v. Stevens,
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Virginia v. Black,
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Watts v. United States,
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Statutes

18 U.S.C. § 875(c) ..... *passim*

Other Authorities

Aaron Smith,
Civic Engagement in the Digital Age,
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Adam N. Joinson,
Disinhibition and the Internet,
PSYCHOLOGY & THE INTERNET
(Jayne Gachenback ed., 2d ed. 2007) 15

Alex Fitzpatrick,
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Charlotte Taylor,
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Danah Boyd,
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Doug Gross,
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Johann Schrammel, Christina Koffel, & Manfred Tscheligi,
How Much Do You Tell? Information Disclosure Behaviour in Different Types of Online Communities, CENTER FOR USABILITY RESEARCH & ENG'G (2008) 18

John Berman,
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John Suler,
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Kathy Goldschmidt & Leslie Ochreiter,
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Lauren Gelman,
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Maeve Duggan & Aaron Smith,
Social Media Update 2013, PEW RESEARCH INTERNET PROJECT (Dec. 30, 2013).....8, 9

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Patricia G. Lange,
Publicly Private and Privately Public: Social Networking on YouTube,
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Social Networking Fact Sheet,
PEW RESEARCH INTERNET PROJECT
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Tal Z. Zarsky,
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INTEREST OF *AMICI CURIAE*[1]

The Student Press Law Center (the "SPLC") is a non-profit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. The SPLC provides free legal information and educational materials for student journalists, and its legal staff jointly authors the widely used media-law reference textbook, Law of the Student Press, now in its fourth edition.

Students and other young adults are prolific users of social media. As such, they are particularly affected by the court of appeals' application of a negligence standard to a statute criminalizing, *inter alia*, threats communicated through social networks. The SPLC has a special concern for ensuring that young Americans' First Amendment right to free speech is not chilled through the misinterpretation of 18 U.S.C. § 875(c).

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1. Pursuant to this Court's Rule 37, *amici* affirm that all parties have consented to the filing of this amicus brief. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's office. Further, no counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief.

The Electronic Frontier Foundation ("EFF") is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 27,600 dues-paying members have a strong interest in helping the courts and policy-makers apply First Amendment principles in a manner that protects the constitutional rights of those who use technology to communicate. EFF works directly with students and young adult community activists to increase awareness and facilitate engagement in advocacy for digital freedom issues. EFF also supports student organizations that wish to advance and promote digital rights on campus by providing resources and materials, organizing events, and keeping student leaders updated on the latest developments in digital rights issues.

PEN American Center is a non-profit association of writers that includes poets, playwrights, essayists, novelists, editors, screenwriters, journalists, literary agents, and translators ("PEN"). PEN has approximately 3,500 members and is affiliated with PEN International, the global writers' organization with 144 centers in more than 100 countries in Europe, Asia, Africa, Australia, and the Americas. PEN International was founded in 1921, in the aftermath of the First World War, by leading European and American writers who believed that the international exchange of ideas was the only way

to prevent disastrous conflicts born of isolation and extreme nationalism.

Today, PEN works along with the other chapters of PEN International to advance literature and protect the freedom of the written word wherever it is imperiled. It advocates for writers all over the world. The interest of PEN in this case is in ensuring that the current flourishing of free speech enabled by online communication is not chilled by an overbroad interpretation of 18 U.S.C. § 875(c) that could lead to widespread censorship by the government and self-censorship by writers using digital platforms.

SUMMARY OF ARGUMENT

When the Court decided *Watts v. United States*, 394 U.S. 705 (1969) (per curiam), it did so against the backdrop of a readily identifiable framing context informing its interpretation of an alleged threat to the President. Thus, the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," when made at a political rally on the Washington Mall was not, as a matter of law, a threat, because of its context. *Id.* at 705-08. The context included the location of the speech, the nature of the gathering, the identity of the speaker, the demeanor of the speaker (he was unarmed and laughing when he made the statement), and the reaction of the crowd (laughter). *See id.* Given the context, the decision was not a difficult one for the Court to make: the statement was not a threat under

either a subjective test (did the speaker specifically intend the statement to be interpreted as a threat?) or an objective test (would a reasonable person interpret the statement as a threat?). *See id.* at 707-08.

In the age of social media, courts across the country will often face quite a different challenge in true threat prosecutions. Now messages including content that might be interpreted as a threat may be made anonymously on an internet message board or other social networking platform. At the time such statements are made, the audience will often not know who the speaker is or where he is, and likewise will not be able to observe the speaker's demeanor or know whether he is armed. As for the nature of the gathering, it will frequently implicate publicly accessible Internet forums. Thus, the audience might be one person or a million people; they are as hidden and anonymous as the speaker. And the reaction of "the crowd" will in many instances be only very imperfectly understood, if not entirely unknowable, because the only information available may be the reaction of other Internet users if they respond to the speaker's message. Further, the written (or other verifiable) reaction may be skewed and unrepresentative of the audience, because only the most engaged and motivated recipients are likely to invest the effort to respond.

This case raises the question of how the "true threat" analysis should be conducted in the digital

age, and in light of the emergence and ascendancy of communications through online networks. The Court should make clear that 18 U.S.C. § 875(c), prohibiting the interstate transmission of "any communication containing . . . any threat to injure the person of another," necessarily includes a subjective intent component. The court of appeals' approach, which adopted a mere negligence standard, is constitutionally insufficient and, if approved, would result in increasing, excessive censorship of constitutionally permissible speech.

In this regard, *amici* SPLC, EFF, and PEN concur entirely with the statutory and constitutional analysis set forth in the Petitioner's opening brief. *Amici* also believe that a sound understanding of the integral importance of social media in the daily lives of Americans, and the manner in which people across the country constantly interact through online networks, will confirm that speakers should not face prison time based solely on misjudgments about the scope of their audience or how a potentially unintended recipient would react to a message.

ARGUMENT

I. THE EMERGENCE OF SOCIAL MEDIA HAS REVOLUTIONIZED AND ENHANCED HOW AMERICANS INTERACT, BUT USERS OFTEN CAN'T DEFINE THEIR AUDIENCE AND MANY COMMUNICATIONS CAN BE MISUNDERSTOOD.

As this Court recognized nearly two decades ago, "[t]he Internet is a unique and wholly new medium of worldwide human communication." *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (internal quotation marks and citation omitted). At that time, the Internet already provided "a wide variety of communication and information retrieval methods" that were "constantly evolving" and that, taken together, "constitute[d] a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." *Id.* at 851.

And at that time, the World Wide Web, the "best known category of communication over the Internet," also already provided those who wished to publish information or communicate with others "a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Id.* at 852-53. Likewise, "from the readers' viewpoint," the Web has long furnished "a vast library including millions of readily

available and indexed publications and a sprawling mall offering goods and services." *Id.* at 853.

In the intervening years since *Reno v. ACLU* was decided, the Internet's profound impact on our daily lives has increased exponentially. As the Court predicted, the Internet and new communications mediums like online social networks have fundamentally changed the manner in which people interact with one another. Indeed, it is no exaggeration to say that online social media has redefined how people talk to and correspond with one another, how they resolve conflicts, and how they form friendships and communities.

However, the rising ascendancy of online social media has also implicated the erosion of the boundaries between publicity and privacy. And a well-recognized aspect of social media communications is that people, particularly young people, will say things online that they would not say in person. Finally, social network users often can't control the scope of their audience, and messages intended for particular recipients may ultimately be read (and potentially misunderstood) by unintended recipients.

All of this means that we now live in an age when Internet users, through online social networks, can stay connected with friends and colleagues in ways that were impossible until recent years. It also means that there are substantially greater

opportunities for a careless, ill-considered, or misunderstood message, perhaps reviewed by an unintended recipient, to implicate criminal liability.

A. The Ascendancy of Social Media.

Social networks are online communication platforms that enable individuals to join and create networks of users. Typically, these services require the creation of profiles by users, in order for others to view and to provide invitations to join various networks and groups. Well-known examples are Facebook, Twitter, and LinkedIn.

In recent years, social networks and online communities "have grown in expanse, complexity, popularity, and recognition, even beyond the realm of internet-savvy users." Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 742 (2008). In fact, recent research shows that, as of January 2014, 74% of adults using the Internet now use a social networking site of some kind. *Social Networking Fact Sheet*, PEW RESEARCH INTERNET PROJECT, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Aug. 21, 2014). And 42% use multiple social networking sites. Maeve Duggan & Aaron Smith, *Social Media Update 2013*, PEW RESEARCH INTERNET PROJECT (Dec. 30, 2013), http://www.pewinternet.org/files/2013/12/PIP_Social-Networking-2013.pdf.

Social networking sites have been particularly popular with teens and young adults, with research showing that 90% of 18-29 year-old Internet users are active on social networks. *See Social Networking Fact Sheet.* Notably, however, the use of social networking by all age groups, including seniors, has risen substantially in the last five years. *See id.* (includes graph showing that approximately 30% of all Internet users were on social networks in May 2008, and as of September 2013 that number had risen above 70%); *see also Social Media Update 2013* at 4 (noting that 45% of Internet users age 65 or older now use Facebook).

This data confirms an otherwise self-evident fact of modern American life: a growing majority of people of all age groups, particularly younger Americans, communicate regularly and extensively through online social networks. And this is unsurprising, because Americans' use of social networking technologies is related to core values: trust, tolerance, social support, community, and political engagement. *See* Keith N. Hampton, Lauren Sessions Goulet, Lee Rainie, & Kristen Purcell, *Social Networking Sites and Our Lives,* PEW RESEARCH INTERNET PROJECT (June 16, 2011), http://www.pewinternet.org/files/old-media//Files/Reports/2011/PIP%20%20Social%20neworking%20sites%20and%20our%20lives.pdf. In fact, Pew Internet Research Project surveys have shown that social networks are increasingly used to keep up close social ties, and that the average user of a social

networking site has more close ties and is half as likely to be socially isolated as the average American. *Id.* at 24. Similarly, Facebook has helped to revive dormant relationships, and Facebook users have more close relationships and are "much more politically engaged than most people." *Id.* at 4.

Thus, online networking has become embedded in our culture precisely because it has tangible, recognized social value.

B. Social Media Has Changed Communicative Norms.

1. The key characteristics of online speech: persistence, visibility, spreadability, and searchability.

As social media has begun to play a more central role in the daily lives of many Americans, it has altered communicative norms in many respects. Prior to the digital age, "individuals lacked the technological megaphone to broadcast their story to the world." Lauren Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. 1315, 1333 (2009). Today, online social networks like Facebook provide that megaphone and facilitate the rapid distribution of communications to massive audiences because of their unique characteristics. *See* Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1667-70 (1998).

Speech occurring on social networks has been aptly described as having four key characteristics: (1) "persistence: the durability of online expressions and content;" (2) "visibility: the potential audience who can bear witness;" (3) "spreadability: the ease with which content can be shared;" and (4) "searchability: the ability to find content." Danah Boyd, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS 11 (2014) (hereafter referenced as "IT'S COMPLICATED").

The "persistence" characteristic of online networks means that "conversations conducted through social media are far from ephemeral, they endure." *Id.* Consequently, "those using social media are often 'on the record' to an unprecedented degree." *Id.*

The visibility characteristic implicates the wide accessibility of social media communications, because most social media platforms are "designed such that sharing with a broader or more public audience is the default." *Id.* at 12. This has also been described as the "unboundedness" of digital information. *See* Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. at 1667-68. Digital information transcends geographic boundaries and cannot be confined to "any . . . spatially bounded audience definition to which other media might be limited." *Id.* And because many popular systems require users to take active steps to limit the visibility of any particular piece of shared content,

social media interactions are typically "public by default, private through effort." Boyd, IT'S COMPLICATED 11.

The "spreadability" and "searchability" characteristics describe how the actions of the intended recipients of social media messages, as well as others perusing the Web, can substantially expand the audience for any particular communication. By design, social media facilitates the spread of information by encouraging the sharing of links, providing reblogging or favoriting tools that repost images or texts, and by making it easy to copy and paste content from one place to another. *Id.* Finally, given the emergence of Internet search engines, people's online communications are searchable. Thus, "any inquisitive onlooker can query databases and uncover countless messages written by and about others." *Id.*

To give just one concrete example, the popular "micro-blogging" platform, Twitter, not only includes within its user interface the ability to "re-tweet" the speech of others to a potentially limitless audience of third- and fourth-degree contacts, but also has given rise to various online publishing tools that exist with the express purpose of empowering users to republish Twitter postings in a new and different context. Among the most popular of these is Storify, a service that enables users to collect and publish Twitter users' "tweets" aggregated into a narrative created by the Storify accountholder, with or without

the knowledge and consent of the original speaker. *See* Patrick Sullivan, *The "Flickr" of An Idea: Apps Don't Necessarily Tell the Complete Digital Story*, THE NONPROFIT TIMES (Feb. 28, 2014) (explaining workings of Storify). Thus, a Twitter user's harmless musing about a violent scene from a movie or television program could turn up, devoid of context but attributed to its original author, in a published narrative that gives the remark ominous unintended meaning.

An important corollary to these aspects of social media speech is that, in comparison to more traditional forms of communication, a person publishing a social media message generally has far less control over the scope of his audience. To begin with, using online social networks can lead to an undefined circulation and distribution of the shared content, making it difficult for speakers to limit their audiences. Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. at 1329. Of course, for many social network users, the benefit of making information available to any interested individual outweighs the cost of allowing access to an undefined group of people. *Id.* at 1317-18.

Further, the interactivity of the Internet allows receivers to use their own volition to "pull" speech, rather than having it "pushed" at them from speaker-initiated sources like the mail or the telephone. Sullivan, *First Amendment Intermediaries*

in the Age of Cyberspace, 45 UCLA L. REV at 1668. When communicating through the mail, for example, the speaker has substantially more control over where the communication ends up, and can intentionally direct the message toward a particular target. *See id.* ("[E]ven a speaker who tries to confine access to information on the basis of the geographical origin of the audience may be foiled because cyberspace addresses do not now exist in territorial domains."). In contrast, online social network users often cannot control or do not appraise their degree of control over their situation. Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. at 1328-29.

2. Online speech implicates changed boundaries of privacy and the phenomenon of disinhibition.

Social networking has also "erod[ed] the boundaries between publicity and privacy in fundamental ways." Patricia G. Lange, *Publicly Private and Privately Public: Social Networking on YouTube*, 13 J. COMPUTER-MEDIATED COMM. 361, 364 (2007) (internal quotation marks omitted). On the Internet, because the barriers for entry are low, and are no greater for speakers than listeners, individuals can become mass transmitters of information and opinion. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. at 1666-67. Changed views of privacy and a

willingness to share personal information are particularly pronounced among young adults. *See* Mary Madden, et al., *Teens, Social Media, and Privacy*, PEW RESEARCH CENTER (May 21, 2013), http://www.pewinternet.org/files/2013/05/PIP_Teens SocialMediaandPrivacy_PDF.pdf (explaining that young Americans are sharing more personal information on social networks than in the past and that they aren't very concerned about third-party access to their data).

Similarly, clinicians and researchers have observed that "people say and do things in cyberspace that they wouldn't ordinarily say and do in the face-to-face world." John Suler, *The Online Disinhibition Effect*, CYBERPSYCHOLOGY & BEHAVIOR 321, Vol. 7, No. 3 (2004). As described by one psychologist, in cyberspace people "self-disclose or act out more frequently or intensely then they would in person," a phenomenon "so pervasive" that a term has surfaced for it: the online disinhibition effect. *Id.*; *see also* Adam N. Joinson, *Disinhibition and the Internet*, PSYCHOLOGY & THE INTERNET 75, 79-81 (Jayne Gachenback ed., 2d ed. 2007).

The disinhibition effect often "indicates an attempt to better understand and develop oneself," and to "explore new emotional and experiential dimensions to one's identity." *Id.* at 321. In this sense, the medium of the Internet uniquely facilitates an informality and immediacy of communication that enables people to share, often

with wide (and sometimes unintended) audiences, their innermost thoughts, dreams, aspirations, and fears.

Likewise, Internet users may give vent to emotions on which they have no intention of acting, memorializing expressions of momentary anger or exasperation that once were communicated face-to-face among friends and dissipated harmlessly. Thus, the uninhibited interaction, discussion, and personal revelations facilitated so powerfully by social media also implicates speech that may be unsavory or even distressing to some recipients, but this is precisely the type of speech the First Amendment is designed to protect. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting.") (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

C. Misunderstandings on Social Media are Commonplace.

1. Context confusion and miscommunication: the risk of benign messages being misunderstood, particularly by unintended recipients.

This Court has recognized one of the Internet's chief democratizing features, its ability to spread

information rapidly and to wide audiences. *Reno v. ACLU*, 521 U.S. at 850 (observing that "[i]ndividuals can obtain access to the Internet from many different sources" and that "[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods"). But the speed-of-light spreadability of information and online messages, which often involves layers of republishing to larger and more diverse audiences, implicates corresponding risks for misunderstanding.

To begin with, the original context of a message, understandable and benign to an intended set of initial recipients, may be misunderstood when republished to a different audience that is unaware of the message's original context.

An instructive example of this problem is the recent case of a young Texan, Justin Carter, who was jailed for months after making "a sarcastic Facebook comment during an argument about a video game". Doug Gross, *Teen in Jail for Months Over 'Sarcastic' Facebook Threat*, CNN TECH (July 3, 2013), http://www.cnn.com/2013/07/02/tech/social-media/facebook-threat-carter/. After playing an online videogame with Carter, one of the other players commented to him online: "Oh you're insane. You're crazy. You're messed up in the head." *Id.* Carter replied, "Oh yeah, I'm real messed up in the head. I'm going to go shoot up a school full of kids and eat their still-beating hearts." *Id.* Carter immediately followed this message with "LOL" and "J/K"—

indicating that the comment wasn't serious. *Id.* The other online gamers with whom Carter was interacting apparently understood he was making a joke, albeit a very poor one. But another Internet user who saw the comment, apparently a woman in Canada, reported it to authorities. *Id.* Carter was arrested and spent months in jail on a charge of making a genuine terroristic threat. *Id.*

As exemplified by the Carter case, for a variety of reasons young people are particularly at risk of being misunderstood. To begin with, they are sharing more personal information online than ever before. *See* Madden, et al., *Teens Social Media, and Privacy* (reporting results of six-year survey of teen online behavior). And while most teens are lifelong technology users and are genuinely concerned about privacy, they may not always conduct themselves accordingly. *See* Johann Schrammel, Christina Koffel, & Manfred Tscheligi, *How Much Do You Tell? Information Disclosure Behaviour in Different Types of Online Communities*, CENTER FOR USABILITY RESEARCH & ENG'G (2008), http://www.sozio-informatik.org/fileadmin/IISI/ upload/2009/p275.pdf. For example, many teens post information on social media that they think is funny or intended to give a particular impression to a narrow audience, without considering how this same content might be read out of context. Boyd, IT'S COMPLICATED 44.

In this regard, "[t]he intended audience matters, regardless of the actual audience." *Id.* at 30. Thus,

even when people say what they mean online, their words can be misunderstood. As a result, comments, conversations, and other content created by and intended for young audiences is being read by older audiences who may not understand the vocabulary, social references, and other context. *See* Boyd, IT'S COMPLICATED 30 ("Unfortunately, adults sometimes believe they understand what they see online without considering how teens imagined the context when they originally posted a particular photograph or comment.").

Of course, misunderstandings are not limited to messages posted by young adults. Earlier this year, a middle-aged art professor at a New Jersey college was suspended without pay for eight days after he posted on Google+ a picture of his smiling seven-year-old daughter wearing an oversized t-shirt with a quote from the television show "Game of Thrones." Sasha Goldstein, *N.J. College Suspends Professor Over 'Game of Thrones' Shirt Perceived as 'Threat'*, NEW YORK DAILY NEWS, (Apr. 18, 2014), http://www.nydailynews.com/news/national/n-college-suspends-professor-threating-game-thrones-shirt-article-1.1761354. Game of Thrones is a hugely popular HBO show whose most recent season finale drew more than 7 million viewers. Rick Kissell, *HBO's 'Game of Thrones' Finale Draws 7.1 Million Viewers Sunday*, VARIETY (June 16, 2014), http://variety.com/2014/tv/ratings/hbos-game-of-thrones-closes-with-7-1-million-viewers-sunday-1201221238/#.

School administrators interpreted the quote, "I will take what is mine with fire and blood," as uttered by one of the show's best-known characters, as threatening a school shooting. Goldstein, *N.J. College Suspends Professor Over 'Game of Thrones' Shirt Perceived as 'Threat'*. In defending the school's actions, a spokesperson cited the number of school shootings that had occurred already this year. *Id.* Such is the school's concern that, even after the misunderstanding was revealed and the teacher reinstated with back pay, the school required him to remain off campus for more than a week and to visit a psychiatrist before returning to work. *Id.*

Under the legal standard applied by the Third Circuit below, the types of misunderstandings described herein would often end with prosecution and potentially years of imprisonment. The mere possibility of such life-ruining consequences, however remote the likelihood of prosecution in reality, invariably will chill constitutionally protected speech. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (stating, in invalidating a criminal statute on First Amendment overbreadth grounds, that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

2. Political speech may also be misunderstood.

Finally, political speech also presents a fertile area for misunderstandings. As social media has grown, it has become a powerful forum for political speech. This speech takes many forms. Organized reporting is often done through social media, with many reporters and political commentators having thousands of followers on Twitter. Some organized news reporting and commentary exists solely on social media. The Young Turks, for example, is a political news and opinion outlet that has existed on YouTube for years.

Every election cycle, Facebook and Twitter ignite with users supporting (or deriding) candidates, parties, and positions, forwarding links to long-form analysis, or simply joining in the latest chat. Some research estimates that 39% of American adults engaged in some sort of political activity on a social network during the 2012 elections. Alex Fitzpatrick, *Pew: Online Political Engagement Can Lead to Offline Activism* (Apr. 24, 2013), http://mashable.com/2013/04/25/pew-internet-politics-activism/; *see also* Aaron Smith, *Civic Engagement in the Digital Age* (Apr. 25, 2013), http://www.pewinternet.org/2013/04/25/civic-engagement -in-the-digital-age/.

Politicians have recognized the power of social media. As of 2011, 98% of the members of Congress

had adopted at least one social media platform as a communication and outreach tool. Sherri R. Greenberg, *Congress + Social Media*, LBJ SCHOOL OF PUBLIC AFFAIRS, UNIV. OF TEX. 1 (Oct. 22, 2012), https://www.utexas.edu/lbj/cpg/docs/research_congress_social_media.pdf. Government agencies have also taken to posting certain public documents on social media sites. *Id.* at 3; *see also* Kathy Goldschmidt & Leslie Ochreiter, *Communicating with Congress: How the Internet Has Changed Citizen Engagement*, CONG. MGMT. FOUND. (2008), http://www.congressfoundation.org/projects/communicating-with-congress/how-theinternet-has-changed-citizen-engagement (chronicling constituents' engagement with congress on social media).

As political speech rises on social media, it is worth noting that, even before the advent of online networks, such speech has a long history of sometimes violent imagery. Legislative proposals are "killed," "shot down," and declared "dead on arrival." *See, e.g.*, *Reagan Says Democrats are Stalling Crime Bill*, PHILADELPHIA INQUIRER, Feb. 19, 1984, at A3 (quoting House subcommittee chairman who declared President's crime legislation "dead on arrival").

And in recent years violent metaphors in political rhetoric have at times been perceived as portending actual violence when distributed online. For example, Sarah Palin triggered an angry response with her online "rifle sights map" that

placed crosshairs over political districts targeted by Palin's campaign. *See* John Berman, *Sarah Palin's Crosshairs Ad Dominates Gabrielle Giffords Debate*, ABC NEWS (Jan. 9, 2011), http://abcnews.go.com/Politics/sarah-palins-crosshairs-ad-focus-gabrielle-giffords-debate/story?id=12576437. Similarly, in a notable YouTube campaign video, West Virginia Governor Joe Manchin attempted to bolster his NRA credentials by actually shooting a copy of cap-and-trade legislation with a hunting rifle. Lucy Madison, *Democrat Joe Manchin Takes "Dead Aim" at Health Care, Cap-and-Trade*, CBS NEWS (Oct. 11, 2010), http://www.cbsnews.com/news/democrat-joe-manchin-takes-dead-aim-at-health-care-cap-and-trade/.

It requires little imagination to surmise that similar speech occurring on social media could be misunderstood by some recipients.

II. APPLYING THE NEGLIGENCE STANDARD TO SOCIAL MEDIA WILL CHILL CONSTITUTIONALLY PERMISSIBLE SPEECH.

This Court has consistently made clear that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Joseph Burstyn v. Wilson*, 343 U.S. 495, 503 (1952)). And "[t]he most basic of

those principles is this: '[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

Here, the Third Circuit has interpreted 18 U.S.C. § 875(c), which prohibits the interstate transmission of "any communication containing . . . any threat to injure the person of another," to require that only an objective test must be met in order to obtain a criminal conviction against a speaker. Thus, under the Third Circuit's approach, a speaker may be convicted regardless of whether he had any subjective intent to threaten, so long as he intentionally made a statement "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted" as a threat. *United States v. Elonis*, 730 F.3d 321, 328 (3d Cir. 2013).

As Petitioner has explained, Pet. Br. 3-4, the Third Circuit's objective test implicates two types of speech restrictions that this Court has made clear pose particular risks to free expression. First, the Court has identified criminal prohibitions on pure speech as "matter[s] of special concern" under the First Amendment because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno v. ACLU*, 521 U.S. at 871-72. Second, the Court has held that

"negligence . . . is [a] constitutionally insufficient" standard for imposing liability for speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). And as Justice Marshall explained, "[i]n essence, the objective [threat] interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Rogers v. United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring); *accord United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*) (noting that the objective test "reduces culpability . . . to negligence"), *cert. denied*, 134 S. Ct. 59 (2013).

The Third Circuit's objective standard, which "transforms even negligent misunderstandings into felonies," Pet. Br. 52, is particularly problematic when applied to social media communications. As described herein, *see supra* Part I, social media messages often reach unintended recipients. And, for example, what may be seen as humor among a community of young adults might be seen as something quite different by other Americans. Thus, the Third Circuit's opinion potentially criminalizes speech so "portable" that it may be copied, pasted and forwarded to a limitless worldwide audience (with or without the original speaker's consent), and received by anyone on social media devoid of its original context. In that case, speakers will be forced to tailor their messages to the sensibilities of the most delicate-eared and easily frightened listener in the world. This Court's frequent admonition—that

"'[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox'"—can be equally applied to the digital "in-box" as well. *Reno v. ACLU*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

Likewise, a negligence-only approach will likely result in increasing and excessive censorship of constitutionally permissible speech online. That is to say, if courts apply a negligence-only standard to alleged threats transmitted online, they will more often find the presence of reasonable fear and thus the existence of a "true threat." The result will be that constitutionally protected speech on the Internet will be chilled.

The Court should avoid this result. In assessing the value of speech for First Amendment purposes, the potential value to the public at large must be taken into account. *See, e.g.*, Charlotte Taylor, *Free Expression and Expressness*, 33 N.Y.U. REV. L. & SOC. CHANGE 375, 420 (2009) ("Any regulation of speech must strike a livable balance among the differing claims of harm, value, culpability, and administrative clarity."). The emergence of social networking has brought tremendous benefits to American society, exponentially enhancing our ability to connect with others, and to establish, maintain, and restore relationships and communities. The Court should ensure that an overbroad and unduly harsh interpretation of a

criminal statute does not remain in place, unnecessarily diminishing what has become a cherished public resource.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

FRANK D. LOMONTE
STUDENT PRESS LAW CENTER
1101 Wilson Blvd.,
Suite 1100
Arlington, VA 22209
(703) 807-1904

DAVID GREENE
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333

KATHERINE GLENN BASS
PEN AMERICAN CENTER
588 Broadway, Suite 303
New York, NY 10012
(212) 334-1660

SEAN D. JORDAN
Counsel of Record
KENT C. SULLIVAN
PETER LIGH
TRAVIS MOCK
SUTHERLAND ASBILL &
BRENNAN LLP
One American Center
600 Congress, Suite 2000
Austin, TX 78701
sean.jordan@sutherland.com
(512) 721-2679

August 22, 2014

AMICUS CURIAE BRIEF

No. 13-983

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,
Petitioner,

v.

UNITED STATES
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT, CARTOONISTS RIGHTS NETWORK INTERNATIONAL, AND CHRIS DICKEY IN SUPPORT OF THE PETITIONER

Robert D. Richards
Pennsylvania Center for the First Amendment
308 James Building
University Park, PA 16802
P: 841-863-1900
Email: rdr2@psu.edu

J. Joshua Wheeler*
Clayton N. Hansen
The Thomas Jefferson Center for the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
P: 434-295-4784
Email: jjw@tjcenter.org

*Counsel of Record for Amici Curiae

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Cases **Pages**

Americans United For Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) 19

Clark v. United States, 250 F. 449 (5th Cir. 1918) .. 22

Cohen v. California, 403 U.S. 15 (1971) 6

Doe v. Small, 964 F.2d 611 (7th Cir. 1992) 19

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 7

Goodling v. Wilson, 405 U.S. 518 (1972) 12

Hedges v. Wauconda School Dist., 9 F.3d 1295 (7th Cir. 1993) 19

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 6

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 7

Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 6

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 10, 23

Pinette v. Capitol Square Review & Advisory Bd., 30 F.3d 675 (6th Cir. 1994) *aff'd*, 515 U.S. 753 (1995) 19

Roth v. United States, 354 U.S. 476 (1957)..... 10

United States v. Apel, 44 F.Supp. 592 (D.C.N.D. Ill. 1942)..... 22

United States v. Jasick, 252 F. 931 (D.C.E.D. Mich. 1918)..... 23

United States v. Stickrath, 242 F. 151 (D.C.S.D. Ohio 1917)..... 22

Virginia v. Black, 538 U.S. 343 (2003)..... 1, 3, 15

Ward v. Rock Against Racism, 491 U.S. 781 (1989).... 6

Watson v. Memphis, 373 U.S. 526 (1963)..... 18

Watts v. United States, 394 U.S. 705 (1969) 11, 22, 23

Other Authorities

U.S. Const. amend. I ..... *passim*

414: Right to Remain Silent, This American Life, Sept. 10, 2010, http://www.thisamericanlife.org/radio-archives/episode/414/transcript 9

Jessica Bennett, *The Emoji Have Won the Battle of Words*, N.Y. Times, July 25, 2014, http://www.nytimes.com/2014/0727/fashion/emoji-have-won-the-battle-of-words.html 21

John Berman, *Sarah Palin's 'Crosshairs' Ad Dominates Gabrielle Giffords Debate*, ABC News, Jan. 9, 2011, http://abcnews.go.com/Politics/sarah-palins-crosshairs-ad-focus-gabrielle-giffords-debate/story?id=12576437 11

Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (Houghton Mifflin 2008) 4, 5

Oliver Burkeman, *New York Post in Racism Row Over Chimpanzee Cartoon*, The Guardian, Feb. 18, 2009, http:// www.theguardian.com/world/2009/feb/18/new-york-post-cartoon-race 12

Heather Chaplin, *The Selective Subculture of 'Fantasy' Gamers*, NPR.org, Jan. 31, 2011, http://www.npr.org/2011/01/31/133371941/the-selective-subculture-of-fantasy-gamers 15

GEORGE CARLIN, CARLIN ON CAMPUS (Eardrum Records 1984) 7, 8

Nigel Collins, *A Little (or a Lot) on the Trashy Side*, ESPN.com, Apr. 17, 2013, http://espn.go.com/boxing/story/_/id/9181554/boxing-distinguished-history-art-trash-talking 13, 14

Oliver Ben Conmy, *Trash Talk in a Competitive Setting: Impact on Self-Efficacy, Affect, and Performance* 2 (Oct. 30, 2008) (unpublished Ph.D. dissertation, Florida State University) 14

Robert A. Fein and Bryan Vossekuil, *Protective Intelligence and Threat Assessment Investigations: A Guide for State and Local Law Enforcement Officials*, 37 (1998). 24

Bill Hicks "Loses It" (Chicago, 1989), YouTube, http://www.youtube.com/watch?v=kQt_cNEvJI8 8

An H. Kuppens & Frank van der Pol, *"True" Black Metal: The Construction of Authenticity by Dutch Black Metal Fans*, 39 EUR. J. COMM. RES. 151 (2014). 7

Pierre Kroll, *Obama and NRA*, The Cagle Post, Dec. 17, 2012, http://www.cagle.com/2012/12/obama-and-nra/ 12

Randall C. Manning, *Texting Dictionary of Acronyms* (2009) 20

Katla McGlynn, *Daniel Tosh Apologizes For Rape Joke Aimed At Female Audience Member At Laugh Factory*, Huffington Post, July 10, 2012, http://www.huffingtonpost.com/2012/07/10/daniel-tosh-rape-joke-laugh-factory_n_1662882.html..... 9

Anthony Mitchell, *A Leet Primer*, Technews World, Dec. 6, 2005, http://www.technewsworld.com/story/47607.html 21

Sean O'Neal, *Tracy Morgan Under Fire for Homophobic Rant*, A.V.Club, June 10, 2011, http://www.avclub.com/article/updated-tracy-morgan-under-fire-for-homophobic-ran-57385..... 8

Eli Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (Penguin 2011)..... 16

David W. Rainey & Vincent Granito, *Normative Rules for Trash Talk Among College Athletes: An Exploratory Study*, 33 J. SPORT BEHAVIOR 276 (September 2010) 13

Richard Sandomir, *Tyson and Lewis Meet in the Fight Before the Fight*, N.Y. Times, Jan. 23, 2002, http://www.nytimes.com/2002/01/23/sports/boxing-tyson-and-lewis-meet-in-the-fight-before-the-fight html 14

Herbert D. Simons, *Race and Penalized Sports Behaviors*, 38 INT'L REV. FOR SOC. OF SPORT 5 (March 2003) 13

Sam Stein, *Sharron Angle Floated '2nd Amendment Remedies' as 'Cure' for 'The Harry Reid Problems'*, Huffington Post, June 16, 2010, http://www.huffingtonpost.com/2010/06/16/sharron-angle-floated-2nd_n_614003.html..... 11

Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* (Oxford Univ. Press 2006) 16

Ken Walters, *Despite Efforts to Protect Privacy, Users Increase Amount of Personal Information Available Online, Carnegie Mellon Study Finds*, Carnegie Mellon University, Mar. 5, 2013, http://www.cmu.edu/news/stories/archives/2013/march/march5_facebookprivacystudy.html..... 18

Ralph Wiley, *Jive Trash Talkin'*, ESPN.com, http://espn.go.com/page2/s/wiley/010125.html ...12, 13

Jason Zinoman, *Toe-to-Toe at the Edge of the Comedy Club Stage*, N.Y. Times, July 17, 2012 8

Ethan Zuckerman, *Rewire: Digital Cosmopolitans in the Age of Connection* (W.W. Norton 2013).....5, 16

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of amicus curiae briefs in this and other federal courts, and in state courts around the country. The Center has been especially active in cases involving the "true threats" exception to First Amendment protection. In *Virginia v. Black*, 538 U.S. 343 (2003) the Center appeared as amicus curiae in every court that heard the case, including this Court. In the present case, the Center was a party to the only amici curiae brief filed in support of the petition for a writ of certiorari.

The Pennsylvania Center for the First Amendment is a leading national research center about the First Amendment housed in the College of Communications at Penn State. For more than 20

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae represents that it entirely authored this brief and no party, its counsel, or any other entity but amici and their counsel made a monetary contribution to fund the brief's preparation or submission. This amici curiae brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of Court for the Supreme Court of the United States.

years, the Pennsylvania Center for the First Amendment has been a leader in education, research and outreach concerning the fundamental rights of free expression and free press in the United States. Founded in 1992, the Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

Cartoonists Rights Network International has been advocating for the free speech rights of political cartoonists for more than 20 years. CNRI fights to protect the human rights and the personal and creative freedom of editorial cartoonists around the world who find themselves under threat, arrest, or intimidation because of the power and influence of their professional work. CRNI's network of over 60 editorial and social cartoonists throughout the world monitors these threats to editorial cartoonists and their families and activates campaigns to raise awareness and public pressure that push back against these threats.

Chris Dickey, professionally known as Chris Bliss, is a writer and comedian whose 30 year career has included performances at venues around the country and appearances on *The Tonight Show with Jay Leno* and *The Late Show with David Letterman*. He is also the founder and Executive Director of *MyBillofRights.org*, the Bill of Rights

Monument Project, a non-partisan nonprofit whose mission is to raise awareness of and respect for the freedoms and principles in the Bill of Rights through the creation of monuments and permanent displays in civic spaces across America. Of his interest in this case, Dickey states: "The First Amendment is critically important to both my professional and nonprofit work. Internet speech is particularly important in my professional work, as social media like Facebook and Twitter are essential ways to reach my audience. My experience as an artist, both in writing and live performance, is that the right to express myself freely and without reservation is absolutely necessary to the creative process. Whenever I can't speak freely in that exploration, it has a direct negative impact on my ability to think clearly and creatively. Speech and written words that cross the line of what's reasonable and acceptable are often the shortest path to discovering the most interesting premises. Put another way, as the poet William Blake wrote some 200 years ago, "The road of excess leads to the palace of wisdom, for we never know what is enough until we know what is more than enough."

ARGUMENT

Confirmation that *Virginia v. Black*, 538 U.S. 343 (2003) requires a subjective intent element in defining true threats is essential to prevent the erosion of First Amendment protections. To hold that

the true threat exception need only take into account how a hypothetical reasonable person would assess the alleged threat ignores the reality that in today's culturally fragmented society, "reasonableness" is more relative than ever before. Individuals who share similar beliefs and values are clustering into culturally homogenous groups that often deliberately limit exposure to outside influence. Within such hubs, unique communicative norms emerge and evolve, heightening the likelihood of misinterpretation by juries not intimately familiar with these novel means of expression.

Although not the cause of this cultural balkanization, the Internet has significantly contributed to it. The same technology that allows users to discover unfamiliar customs, values, and viewpoints, also allows them to discover likeminded people to an extent not previously possible. This in turn facilitates the creation of the homogenized communities discussed above.

I. Modern Communicative Norms are Inconsistent with an Objective Intent Approach to True Threat Analysis

Sociologists have long understood the propensity for people to deliberately sort themselves into like-minded communities based on lifestyle, faith, politics, and various other demographic factors. *See generally* Bill Bishop, *The Big Sort: Why the*

Clustering of Like-Minded America Is Tearing Us Apart (Houghton Mifflin 2008) (describing the historic precursors to a dramatic self-segregation of the American population over the last quarter of the twentieth century); Ethan Zuckerman, *Rewire: Digital Cosmopolitans in the Age of Connection* 70 (W.W. Norton 2013) (noting that the phenomenon is characterized by researchers as "'a basic organizing principle' of human societies and groups"). Certain important consequences of this behavior are equally well known. It is readily accepted, for example, that such communities act as social resonators, amplifying the voices and beliefs of those within the group while simultaneously drowning out competing expression. *See* Bishop, *supra*, at 6. Furthermore, such groups are understood to have a direct effect on the reasoning and expression of group members. Specifically, group members are subject to the phenomenon of group polarization—also known as the "risky shift" phenomenon—whereby a community becomes increasingly more extreme over time in the direction of its constituent members' average opinion. *See id.* at 66–69. In short, "mixed company moderates; like-minded company polarizes." *Id.* at 68.

These phenomena apply to large and small groups alike, and neither popularity nor pedigree can alter the inevitable outcome. One can observe group polarization and its effect on inter-group communication in a number of distinct areas of expressive activity.

A. Musical Expression

This Court has repeatedly recognized the protections afforded to music as a form of artistic expression under the First Amendment. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998). A survey of several contemporary musical subcultures quickly brings to mind Justice Harlan's observation that, often, "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). Hip-hop and rap, for example, are notorious for frequently presenting aggressive and explicit content through a unique mix of slang, idiom, and unconventional dialect that acts to divide those within the genre and culture from outsiders.[2] Heavy metal music—particularly the subgenre known as "black metal"—employs structural and communicative barriers to outside observers similar to those found in rap. Within this community, a number of lyrical themes and tropes have come to define both the music and its fans. Black metal is one of heavy metal's most extreme offshoots in that the artists attempt to deviate as far as possible from what they perceive to

[2] For an extensive discussion of how the communicative norms of hip-hop are frequently misunderstood by listeners outside the community, see the amici curiae brief filed by the Marion B. Brechner First Amendment Project and Rap Music Scholars in this case.

be mainstream values in pursuit of artistic authenticity. *See generally* An H. Kuppens & Frank van der Pol, *"True" Black Metal: The Construction of Authenticity by Dutch Black Metal Fans*, 39 EUR. J. COMM. RES. 151 (2014) (noting that "authenticity" in this context is more a measure of how controversial or grotesque the theatrical aspects of an artist's act are rather than a measure of legitimacy or genuineness). Although the outrageous elements that characterize black metal generally reflect fantasy rather than reality, those outside of the culture are unlikely to appreciate the extent to which the performance is instructed by various stock mannerisms and expressive tropes. As a result, there is a high likelihood that outsiders exposed to black metal may misconstrue its violent lyrical imagery and grotesque physical performance as actual menace.

B. Comedy and Satire

This Court has also recognized the importance of comedic and satirical speech to our public discourse. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54–55 (1988) (noting the important role of political satire in public life); *cf. FCC v. Pacifica Foundation*, 438 U.S. 726, 747 (1978) (assuming, *arguendo*, that George Carlin's "Filthy Words" monologue enjoyed full First Amendment protection). Throughout our history, from Mark Twain to Lenny Bruce, speakers have pushed the boundaries of protected expression through humor, often endeavoring to make light of taboo or

macabre subjects through sarcasm, hyperbole, and satire. *See, e.g.*, Sean O'Neal, *Tracy Morgan Under Fire for Homophobic Rant*, A.V.Club, June 10, 2011, http://www.avclub.com/article/updated-tracy-morgan-under-fire-for-homophobic-ran-57385 (The comedian joked that he would stab his own son to death if the boy turned out to be gay.); GEORGE CARLIN, CARLIN ON CAMPUS (Eardrum Records 1984) (Carlin proclaimed his personal motto to be: "Live and let live. Anyone who can't go along with that, take 'em outside and shoot the motherfucker.").

Humorists thus comprise another discrete subculture whose communicative norms are developed and policed from within. As a result, comedy enthusiasts will approach and interpret a performer's material much differently than unfamiliar listeners. This is particularly true in live settings where performers often employ violent rhetoric as a means of responding to unruly audience members, known as "hecklers." *See, e.g.*, *Bill Hicks "Loses It"* (Chicago, 1989), YouTube, http://www.youtube.com/watch?v=kQt_cNEvJI8 (Responding to multiple hecklers in the audience, the comedian began ranting that "Hitler had the right idea, he was just an underachiever. Kill 'em all, Adolf. All of 'em—Jew, Mexican, American, White—Kill 'em all!"); *see also* Jason Zinoman, *Toe-to-Toe at the Edge of the Comedy Club Stage*, N.Y. Times, July 17, 2012, at C1 (describing the unspoken rule among comedians and hecklers as: "You fire at a cop, get ready to die"). To members of the community, this sort of behavior is

not only normal, it is celebrated. Outsiders, however, frequently find the interaction highly disturbing. When the comedian Daniel Tosh was interrupted by a female audience member who loudly objected to his joke about rape, he responded by asking "Wouldn't it be funny if that girl got raped by, like, five guys right now? Like *right now*?" The crowd erupted with laughter, but the woman was so overcome with concern for her personal safety that she left the show, later describing the experience as "viscerally terrifying and threatening." Katla McGlynn, *Daniel Tosh Apologizes For Rape Joke Aimed At Female Audience Member At Laugh Factory*, Huffington Post, July 10, 2012, http://www.huffingtonpost.com/2012/ /07/10/daniel-tosh-rape-joke-laugh-factory_n_ 1662882.html.

Misunderstandings are likely to arise in other contexts as well, such as when comedians "perform" in nontraditional settings that are open to outside listeners. This very situation found comedian Joe Lipari facing criminal threat charges after he posted on Facebook about the bad service he had received at a local Apple Store. Paraphrasing a scene from the movie *Fight Club*, he changed his public Facebook status to "Joe Lipari might walk into an Apple store on Fifth Avenue with an Armalite AR-10 gas-powered semi-automatic weapon and pump round after round into one of those smug, fruity little concierges." *414: Right to Remain Silent*, This American Life, Sept. 10, 2010, http://www.thisamericanlife.org/radio-archives/ episode/414/transcript. Although the charges were

ultimately dropped, the fact remains that had Lipari made the exact same comment as part of his stand-up show, it is very likely that nothing would have come of it. By exposing "objective" outsiders to controversial—yet protected—expression, Lipari and other comedians risk damage to their careers as well as their constitutional rights.

C. Political Hyperbole

Political speech clearly lies at the core of First Amendment protection. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957) (noting that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (endorsing the principle that "debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). Those who are immersed in political activity exist in yet another distinct community—albeit one more mainstream than others. The politically active speaker may still find his expressive norms alienating to those less engaged with politics. This is often due to the prevalence of hyperbole among political speakers. Although political hyperbole is common among speakers of various political persuasions, positions articulated by

way of extreme or even violent exaggeration may easily offend or intimidate outside listeners. *Cf. Watts v. United States*, 394 U.S. 705, 708 (1969) (distinguishing protected political hyperbole from true threats). In such cases, protected political hyperbole may appear threatening if the speech is targeted at or inadvertently reaches an "objective" outsider unfamiliar with the prevailing norms. This very scenario occurred in 2010, when Sarah Palin's political action committee issued a map featuring crosshairs placed atop the districts of twenty House Democrats who had voted in favor of the Affordable Care Act. John Berman, *Sarah Palin's 'Crosshairs' Ad Dominates Gabrielle Giffords Debate*, ABC News, Jan. 9, 2011, http://abcnews.go.com/Politics/sarah-palins-crosshairs-ad-focus-gabrielle-giffords-debate/story?id=12576437. The map urged Palin's followers to "take a stand" and to "take back the 20." *Id.* When Rep. Gabrielle Giffords—whose district was targeted on the map—was the victim of a shooting, Palin was criticized for employing what some saw as dangerous and incendiary symbolism, even though there appeared to be no ties between the map and Gifford's shooting. When asked to explain the use of the crosshair imagery, a spokesperson for the political action committee stated "it never occurred to us that anybody would consider it violent." *Id. See also* Sam Stein, *Sharron Angle Floated '2nd Amendment Remedies' as 'Cure' for 'The Harry Reid Problems'*, Huffington Post, June 16, 2010, http://www.huffingtonpost.com/2010/06/16/sharron-angle-floated-2nd_n_614003.html.

Occasionally, the divide between in-group speakers and outsiders is so great that even simple political cartoons are perceived as threats by otherwise "reasonable" listeners. *See, e.g.*, Oliver Burkeman, *New York Post in Racism Row Over Chimpanzee Cartoon*, The Guardian, Feb. 18, 2009, http://www.theguardian.com/world/2009/feb/18/new-york-post-cartoon-race (cartoon depicting two police officers having just shot a chimpanzee that many readers believed was intended to represent President Obama); Pierre Kroll, *Obama and NRA*, The Cagle Post, Dec. 17, 2012, http://www.cagle.com/2012/12/obama-and-nra/ (cartoon depicting President Obama being held at gunpoint by an individual wearing a National Rifle Association t-shirt).

D. "Trash Talk"

The First Amendment protects the use of "opprobrious words or abusive language" which do not, "by their very utterance . . . tend to incite an immediate breach of the peace." *Goodling v. Wilson*, 405 U.S. 518, 525 (1972). This bulwark extends to most trash talk, a form of verbal jousting interwoven into various athletic and competitive cultures. Legendary figures such as Muhammad Ali and Larry Bird have been celebrated for the way they used trash talk to skillfully get inside the heads of their opponents. *See, e.g.*, Ralph Wiley, *Jive Trash Talkin'*, ESPN.com, http://espn.go.com/page2/s/wiley/010125.

html (lauding Ali as "a fountain of rich, thoughtful abuse"). In most circumstances, the subjective intent of all trash talkers is the same: to gain a competitive advantage by throwing their opponent off of their game. Both competitors understand that different rules govern what can and cannot be said in the course of play. This is also usually clear to spectators and others within a particular sporting community. Outsiders, on the other hand, may easily misunderstand these interactions, mistaking carefully orchestrated strategy for wanton animus.

Outsiders are further disadvantaged because, while trash talk is prevalent at nearly all levels of competition, *see* David W. Rainey & Vincent Granito, *Normative Rules for Trash Talk Among College Athletes: An Exploratory Study*, 33 J. SPORT BEHAVIOR 276 (September 2010), its nature and acceptability varies widely. Studies have identified differences in the usage, content, and frequency of trash talk based on gender, level of competition, and type of sport. *Id.* Norms governing trash talk vary by culture as well, Herbert D. Simons, *Race and Penalized Sports Behaviors*, 38 INT'L REV. FOR SOC. OF SPORT 5, 13–14 (March 2003), further leading to potential misinterpretations of a speaker's intent.

In some sports, trash talk is not just tolerated but encouraged as a means of attracting interest for an upcoming event. *See* Nigel Collins, *A Little (or a Lot) on the Trashy Side*, ESPN.com, Apr. 17, 2013,

http://espn.go.com/boxing/story/_/id/9181554/boxing-distinguished-history-art-trash-talking. This is most common in combat sports, where due to the violent nature of the competition and the circus-like atmosphere surrounding its promotion, trash talk takes a particularly menacing (and public) form. *See, e.g.*, Richard Sandomir, *Tyson and Lewis Meet in the Fight Before the Fight*, N.Y. Times, Jan. 23, 2002, http://www.nytimes.com/2002/01/23/sports/boxing-tyson-and-lewis-meet-in-the-fight-before-the-fight.html (describing one notoriously chaotic press conference with the boxer Mike Tyson as "both comic and frightening").

Trash talk is not just limited to athletic competitions. It has also become a common feature of the rapidly growing online gaming community. *See* Oliver Ben Conmy, *Trash Talk in a Competitive Setting: Impact on Self-Efficacy, Affect, and Performance* 2 (Oct. 30, 2008) (unpublished Ph.D. dissertation, Florida State University) *available at* http://diginole.lib.fsu.edu/cgi/viewcontent.cgi?artcle=2617&context=etd. While on some levels, online competitors mirror their real-world counterparts in their methods of verbal sparring, the lack of face-to-face interaction and the fact that gamers don't have to use their real names means the level of vitriol is often ratcheted up in online gaming. Furthermore, while many people play video games, there are distinct niches within the broader gaming culture devoted to specific game genres, each of which attract different types of players and exhibit unique expressive

conventions. *See* Heather Chaplin, *The Selective Subculture of 'Fantasy' Gamers*, NPR.org, Jan. 31, 2011, http://www.npr.org/2011/01/31/133371941/the-selective-subculture-of-fantasy-gamers.

II. Online Speech is Shaped by Unique Behavioral and Structural Dynamics that are Incompatible with an Objective Intent Approach to True Threat Analysis

Confirming that *Virginia v. Black*, 538 U.S. 343 (2003), requires a subjective approach in true threat analysis is paramount to the protection of free speech because of the ways in which the Internet impacts communication. Although the Internet has the technical capacity to bring those with diverse and disparate viewpoints together to exchange ideas, its nature and infrastructure have instead driven many users further apart. The Internet also limits the control a speaker has over her audience. The coexistence of these two factors makes it increasingly difficult to assign an objective meaning to a particular expression, especially when it was intended for a limited audience but found its way into a larger community with different sensitivities.

While the Internet provides individuals with unprecedented access to viewpoints that differ from their own, it also increases access to likeminded people and permits users to shield themselves from competing expression. *See* Cass R. Sunstein,

Infotopia: How Many Minds Produce Knowledge 188 (Oxford Univ. Press 2006) ("The rise of blogs makes it all the easier for people to live in echo chambers of their own design. Indeed, some bloggers, and many readers of blogs, live in information cocoons."); Zuckerman, *Rewire* at 100–01 (observing that the Internet "isolation index"—a measurement used by economists and sociologists to determine the likelihood of meeting someone from another social group or belief system—is greater than those of local newspapers, national magazines, and both broadcast and cable television). This, in turn, has facilitated the proliferation of insular online communities whose members often devise their own forms and methods of communication.

The creation of these communities has been expedited by the infrastructure of the Internet itself. *See generally* Eli Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (Penguin 2011). Pariser reveals that many major platforms from which Internet users receive content, such as Google and Facebook, self-edit in an effort to provide particular individuals with content that most coincides with their preexisting interests and opinions. Users who do not actively insulate themselves from opposing viewpoints still only receive content that a computer algorithm has deemed favorable to them. *See id.* at 2. Instead of uniting those with conflicting views, the Internet has created an experience that caters to each user's idiosyncratic views and sensitivities. Because of this

tendency to separate individuals into different groups with unique perspectives, interests, and styles of communication, the notion that a single "reasonable person" exists relative to these disparate interests is a fiction. Instead, countless audiences exist absent any clear delineation, all of which have the capacity to interpret a single piece of expression in numerous ways.

This problem is exacerbated by the lack of audience control experienced by online speakers. Although a speaker may intend for a message to reach only those in a defined and limited social network (an audience for which the speaker is less likely to censor herself), the Internet has the capacity to transform such targeted, quasi-private speech into a message accessible by much larger audiences. As such, an individual using the Internet as a medium of dissemination may not always be certain that her expression is reaching only the intended audience and not Internet users at large.

For several reasons, speakers are often unaware of this lack of audience control. First, some speakers may not be able to manipulate the technical aspects of each social media platform to limit their conversations to a certain audience. While many social media outlets allow users some level of control over how far-reaching their messages will be, many users have difficulty understanding these controls. *See* Ken Walters, *Despite Efforts to Protect Privacy,*

Users Increase Amount of Personal Information Available Online, Carnegie Mellon Study Finds, Carnegie Mellon University, Mar. 5, 2013, http://www.cmu.edu/news/stories/archives/2013/march/march5_facebookprivacystudy.html. Second, some speakers may be aware of the aforementioned "filter bubble" and thus wrongfully assume that their message will only reach others within their respective online communities, however defined, not understanding that the audience within digital earshot is in fact much larger. Finally, even in circumstances where a speaker has done their best to limit their audience, the Internet facilitates sharing by and among unintended third-party listeners. *See id.* Because speakers may have a false sense of security when expressing themselves on the Internet, particularly through social media, their expression may be more candid than it otherwise would be. Listeners outside of the intended audience may be more sensitive than those with whom the speaker intended to communicate. Under an objective approach to true threat analysis, this lack of audience control makes contextualization and, thus, objective interpretation more difficult.

An objective intent approach to true threat analysis also subjects speakers to a heckler's veto, whereby hostile listeners enjoy an ad hoc veto power over a speaker's freedom of expression. *See Watson v. Memphis*, 373 U.S. 526, 535 (1963) ("constitutional rights may not be denied simply because of hostility to their assertion or exercise."). In the context of the

Internet and social media, in which a speaker's control over her message and her audience is limited, a hypersensitive or ignorant listener could silence otherwise protected speech under an objective intent standard.[3] Audience members unfamiliar with the speaker's use of language, sense of humor, or other communicative peculiarities will be more likely to misinterpret her speech and misinform an objective intent analysis, potentially chilling protected speech. A subjective intent requirement, in contrast, would eliminate concerns about an uninformed audience member holding a veto over a speaker as it would provide greater context to the speech and would be more reflective of actual intent.

Filtering and audience control are not the only issues contributing to the disconnect experienced by outside listeners exposed to unfamiliar online speech. The Internet offers an abundance of unique modes of communication, each of which may be used by only one subgroup, or, if shared, may be used in entirely different ways by each community. The common factor

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[3] An analogous concept in the context of religious speech has often been referred to as the "ignoramus's" or the "obtuse observer's" veto and courts have often been critical of the government's enforcement of such a veto. *See Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring); *Americans United For Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992); *Hedges v. Wauconda School Dist.*, 9 F.3d 1295, 1299–1300 (7th Cir. 1993); *Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 679 (6th Cir. 1994) *aff'd*, 515 U.S. 753 (1995).

among all of these modes, however, is their propensity for confusion, alienation, and misinterpretation by outside listeners.

Some are deceptively simple, such as the 140-character limit imposed by the microblogging app Twitter. Speakers communicating on Twitter are forced to ruthlessly edit their expression to fit within this character limit, stripping away most—if not all—of the contextual clues that would ordinarily inform the speaker's written communication. As a result, Twitter functions much like a newspaper that elects to withhold any semblance of in-depth reporting from its readers, opting instead for the naked efficiency of attention-grabbing headlines.

More disorienting still are communicative modes that alter existing linguistic conventions or create new ones from whole cloth. It will come as no surprise to anyone who has ever sent or received a text message that, for matters of efficiency and expediency, speakers frequently abbreviate their expression in any number of ways when texting. However, the extent to which text messages can be—and commonly are—fundamentally distorted is truly staggering. *See, e.g.*, Randall C. Manning, *Texting Dictionary of Acronyms* (2009) (providing "over 1,000 acronyms and symbols used by the mainstream texting world"). Many text-based speakers have taken abbreviation to an entirely new level, communicating exclusively through pictorial icons known as "emoji." *See,* Jessica

Bennett, *The Emoji Have Won the Battle of Words*, N.Y. Times, July 25, 2014, http://www.nytimes.com/2014/0727/fashion/emoji-have-won-the-battle-of-words.html (noting, among other developments, that *Emoji Dick*, an all-emoji version of *Moby Dick*, was recently accepted into the Library of Congress). Then there are the invented languages, the oldest and most well known of which is "1337" (pronounced "leet"). Half substitution cypher, half alternative alphabet, 1337 "has outgrown its roots as an obscure communication system for computer bulletin board users and has become a broad cultural phenomenon." Anthony Mitchell, *A Leet Primer*, Technews World, Dec. 6, 2005, http://www.technewsworld.com/story/47607.html (Mitchell notes that the language can be so disorienting to newcomers that "non-native speakers of English are often quicker to pick up and expand upon leet than native speakers.").

The implications of insular communities communicating via unfamiliar modes are highly troubling, as the disconnect between speaker and listener is magnified exponentially, practically ensuring misunderstandings. The First Amendment demands that such misunderstandings must not be permitted to inform application of criminal threat statutes such as 18 U.S.C. §875 in the guise of a reasonable person, objective intent standard.

III. Interpreting 18 U.S.C. § 875 to Require a Showing of Subjective Intent to Threaten is

More Protective of First Amendment Rights and Consistent with Real World Threat Investigations

This Court's deliberation in *Watts* reminds us that, in the absence of a subjective intent requirement, the government may all too easily target political dissent by labeling disfavored speech as unprotected threats. Prior to the *Watts* decision, the Alien and Sedition Laws and other acts including 18 U.S.C. §871 (proscribing threats against the President of the United States) were commonly applied to protected political hyperbole. *See, e.g., Clark v. United States*, 250 F. 449 (5th Cir. 1918); *United States v. Stickrath*, 242 F. 151 (D.C.S.D. Ohio 1917); *United States v. Apel*, 44 F.Supp. 592 (D.C.N.D. Ill. 1942). One district court judge explained the accepted scope of §871 at the time thusly:

> The purpose of the statute was undoubtedly, not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. . . . It arouses

> resentment and concern on the part of patriotic citizens.

United States v. Jasick, 252 F. 931, 933 (D.C.E.D. Mich. 1918). The *Watts* decision ensured that such statutes would no longer be used to punish speakers' protected expressions. To that end, this Court recognized that threat statutes must be interpreted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times v. Sullivan*, 376 U.S. 254 (1964)).[4]

In addition to being more compatible with the way contemporary society communicates, the subjective test is also more consistent with the criteria used by law enforcement agencies when evaluating threats.[5] This approach is exemplified by a guide published by the Justice Department detailing the procedures followed by the Secret Service when

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[4] Interestingly, in *Sullivan*, the Court concluded that a subjective intent standard was required in libel cases against public fugues in order to ensure the maintenance of robust and open debate.

[5] An exception to this may be bomb threats. Due to the inevitable disruption these threats cause, the resources spent investigating their authenticity, and the fact that the threat has usually been cleared by the time the perpetrator is questioned, law enforcement is generally not concerned with the mindset of the threat initiator.

investigating threats against the president. The guide states that the primary purpose of a threat investigation is to collect "information and evidence that will help determine whether an individual has the interest, motive, and capacity to mount an attack on a target." Robert A. Fein and Bryan Vossekuil, *Protective Intelligence and Threat Assessment Investigations: A Guide for State and Local Law Enforcement Officials*, 37 (1998) *available at* www.secretservice.gov/ntac/PI_Guide.pdf. The guide acknowledges that while the act of making the threat itself is often criminal behavior, that fact alone is merely a reason to begin an investigation. *Id.* at 26.

In order to determine if a suspect is an actual threat, the service investigates a variety of subjective factors, including the facts surrounding the alleged threat, the suspect's educational background, criminal history, interest in extremist ideas or radical groups, and mental health history, with the understanding that "any errors should be made on the side of safety and violence prevention." *Id.* at 39. Despite this cautious approach, the high stakes involved, and a broad spectrum of reported incidents, the secret service still successfully employs a subjective investigation standard to keep the President safe.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the decision below.

Respectfully submitted,

/s/ J. Joshua Wheeler

Robert D. Richards
Pennsylvania Center for
the First Amendment
308 James Building
University Park, PA 16802
P: 841-863-1900
Email: rdr2@psu.edu

J. Joshua Wheeler*
Clayton N. Hansen
The Thomas Jefferson
Center for the Protection
of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
P: 434-295-4784
Email: jjw@tjcenter.org

*Counsel of Record for Amici Curiae

AMICUS CURIAE BRIEF

No. 13-983

In The
Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF WISCONSIN AND SEVENTEEN OTHER STATES, THE DISTRICT OF COLUMBIA, GUAM, AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

J.B. VAN HOLLEN
Wisconsin Attorney General

THOMAS C. BELLAVIA*
Assistant Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690 / (608) 267-2223 (Fax)
bellaviatc@doj.state.wi.us
**Counsel of Record*

ADDITIONAL COUNSEL FOR AMICI CURIAE

Michael C. Geraghty
Attorney General of Alaska
Post Office Box 110300
Juneau, Alaska 99811

Janet T. Mills
Attorney General of Maine
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006

Arizona Attorney General Tom Horne
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Bill Schuette
Michigan Attorney General
Post Office Box 30212
Lansing, MI 48909

John W. Suthers
Attorney General
State of Colorado
Colorado Department of Law
Ralph L. Carr Colorado
Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Main: (720) 508-6000
Phone: (720) 508-6559

Jim Hood
Mississippi Attorney General
Post Office Box 220
Jackson, MS 39205

Irvin B. Nathan
Attorney General for the
District of Columbia
441 4th Street, N.W.
Washington, D.C. 20001

Kay Chopard Cohen
Executive Director
National District Attorneys
Association
99 Canal Center Plaza, Suite 330
Alexandria, VA 22314

Leonardo M. Rapadas
Attorney General of Guam
Office of the Attorney General
590 S. Marine Corps Dr.
ITC Bldg., Ste. 706
Tamuning, Guam 96913

David M. Louie
Attorney General of Hawai'i
425 Queen Street
Honolulu, Hawaii 96813

Lawrence G. Wasden
Idaho Attorney General
Post Office Box 83720
Boise ID 83720-0010

Lisa Madigan
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601

Tom Miller
Attorney General of Iowa
1305 East Walnut Street
Des Moines, IA 50319

Jack Conway
Attorney General of Kentucky
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601

Gary K. King
Attorney General of New Mexico
Post Office Drawer 1508
Santa Fe, NM 87504-1508

Kathleen G. Kane
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Peter F. Kilmartin
Rhode Island Attorney General
150 South Main Street
Providence, RI 02906

Alan Wilson
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Sean D. Reyes
Utah Attorney General
Utah State Capitol, Suite #230
Post Office Box 142320
Salt Lake City, Utah 84114-2320

Robert W. Ferguson
Attorney General of Washington
1125 Washington Street SE
Post Office Box 40100
Olympia, WA 98504-0100

QUESTION PRESENTED

Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

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Tompkins v. Cyr,
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United States v. Alkhabaz,
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United States v. Darby,
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United States v. DeAndino,
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United States v. Himelwright,
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United States v. Schneider,
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18 U.S.C. § 115(a)(1)(B) 6

18 U.S.C. § 248 6

18 U.S.C. § 1503 6

26 U.S.C. § 7212(a) 6

OTHER AUTHORITIES

J. L. Austin, *How To Do Things With Words* 1 (2d ed. 1975) 19, 20, 21, 22

Katrina Baum and Shannon Catalano, U.S. Dept. of Justice, Bureau of Justice Statistics, *Stalking Victimization in the United States* 6 (2009) 11, 13

Joanne Belknap et al., *The Role of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Pol'y 373 (2012) 9, 30, 31

Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 Cardozo L. Rev. 525 (1993) 13, 31

Shannon Catalano, U.S. Dept. of Justice, Bureau of Justice Statistics, *Stalking Victims in the United States – Revised* 1 (2012).....7, 9

Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 2 (2011).....9, 12

Centers for Disease Control and Prevention, *Intimate Partner Violence in the United States—2010* (2014).....12, 13

Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191 (1993) 30, 31, 32

Joan Erskine, *If It Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 Brook. L. Rev. 1207 (1999) 30

Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 Nw. U. L. Rev. 1081 (1983) 19, 20

Kent Greenawalt, *Speech and Crime*, 1980 Am. B. Found. Res. J. 645 19

Melvin Huang, *Keeping Stalkers at Bay in Texas*, 15 Tex. J. C.L. & C.R. 53 (2009) 8, 9

Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U. C. Davis L. Rev. 1107 (2009) 7

Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 Stan. L. Rev. 1337 (2006) 10, 12, 18

Robert Kurman Kelner, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 Va. L. Rev. 287 (1998) 10

Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. U. L. Rev. 45 (2011) 20, 21, 22, 27

Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 Homicide Studies 3 (1999) 9, 10

Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 Hofstra L. Rev. 1295 (1993) 30

John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 Buff. L. Rev. 653 (1994) 11, 23

Adeola Olagunju and Christine Reynolds, *Domestic Violence*, XIII Geo. J. Gender & L. 203 (2012) 7, 8

Michele Pathé and Paul E. Mullen, *The Impact of Stalkers on Their Victims*, 170 British J. of Psychiatry 12 (1997).....9, 13

Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 Wm. & Mary J. Women & L. 495 (2008)..... 12, 13

O. Lee Reed, *The State Is Strong But I am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals With Violence*, 38 Am. Bus. L. J. 177 (2000).....20

Restatement (Second) of Contracts § 212 cmt. a (1981) 22

John Rothchild, *Menacing Speech and the First Amendment,* 8 Tex. J. Women & L. 207 (1999)..... 19

Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 Harv. J. L. & Pub. Pol'y 283 (2001) 13

Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning,* 2003 Sup. Ct. Rev. 197 18

Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 Fam. L. Q. 353 (2008)..... 31

John Searle, *Speech Acts: An Essay in the Philosophy of Language* 45 (1969).....21

John R. Searle and Daniel Vanderveken, *Foundations of Illocutionary Logic* 27 (1985).....21

Cindy Southworth et al., National Network to End Domestic Violence, *A High-Tech Twist on Abuse: Technology, Intimate Partner Stalking, and Advocacy* 3 (2005).....10

Cynthia Southworth et al., *Intimate Partner Violence, Technology, and Stalking*, 13 Violence Against Women 842 (2007).....30, 31

Patricia G. Tjaden, *Stalking Policies and Research in the United States: A Twenty Year Retrospective*, 15 Eur. J. Crim. Policy Res. 261 (2009).....7, 8, 9, 10

Patricia Tjaden and Nancy Thoennes, U.S. Dept. of Justice, National Institute of Justice, *Stalking in America: Findings From the National Violence Against Women Survey* 3 (1998).....8, 13

Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959 (2004) 12, 30, 32

U.S. Dept. of Justice, National Institute of Justice, *Project to Develop a Model Anti-Stalking Code for States* (1993) 8

U.S. Dept. of Justice, Office of Community Oriented Policing Services, *Creating an Effective Stalking Protocol* (2002) 11, 12

INTEREST OF AMICI CURIAE

The *amici* States have a strong interest in the outcome of this case.[1] As sovereign governments elected to serve their citizens, the *amici* States are committed to protecting the freedoms enshrined in the First Amendment. At the same time, the *amici* States are acutely aware of the great harms to individuals and to society created by threats of violence. Such threats disrupt victims' lives, damage their physical and mental health, and interfere with their freedom to conduct legitimate activities. States have a substantial interest in protecting their citizens from such harms.

For that reason, the legislatures in the *amici* States have enacted statutes that prohibit various types of threats. The effectiveness of these statutes would be significantly diminished if the First Amendment were construed as requiring a subjective intent to threaten.

The *amici* States are joined in this brief by *amicus* National District Attorneys Association ("NDAA"). The NDAA has approximately 7,000 members and is the largest and primary professional association of prosecuting attorneys in the United States. With a mission "[t]o be the voice of America's prosecutors and to support their efforts to protect the

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[1] The states joining this brief, the District of Columbia, and Guam are collectively designated herein as "the *amici* States."

rights and safety of the people," the NDAA shares the interest of the *amici* States in the effectiveness of state laws that protect people from the serious harms caused by threats.

To advance these interests the *amici* States and the NDAA submit this brief in support of the position of the United States.

SUMMARY OF ARGUMENT

Speech that threatens harm to others injures individuals and society by causing fear and disruption. To protect against such injury, the states and the federal government prohibit threatening speech in a variety of ways. The First Amendment does not protect genuine threats against such prohibitions, because threats cause great harm while serving no redeeming purpose. That harm does not depend on the subjective intent of the speaker, but rather is inflicted by the very utterance of speech with an objectively threatening meaning.

1. Government has a compelling interest in preventing the harms caused by threats and both federal and state governments have, therefore, enacted statutes that criminalize threats in a variety of circumstances. Many of these laws recognize that the injuries arise from the objective meaning of the threatening speech and thus apply regardless of the speaker's subjective motive.

Particularly important are laws that prohibit stalking and domestic abuse. Such laws typically apply not only to violent or intimidating physical conduct, but also to threatening a victim. Stalking and domestic abuse cause widespread and severe harms that result not only from physical violence, but also from fear and its disruptive effects. By generating fear, the mere utterance of a threat inflicts injury—physical, emotional, social, and economic.

2. a. Threats of violence are one of the limited categories of speech that this Court has found to be unprotected by the First Amendment because they directly harm society while contributing little or nothing to the exposition of ideas. Excluding threats from First Amendment protection is justified by society's interest in protecting people from the fear of violence and the disruptive effects of such fear.

b. The Court has not, however, precisely defined the boundaries of the category of unprotected threats. Most lower courts have applied an objective standard that does not inquire into the speaker's subjective purpose, but asks whether a reasonable person would foresee that the communication, considered in its context, would be understood as a threat. That standard best promotes the purposes of allowing government to prohibit threats.

Threatening speech does not communicate ideas but rather, by its very utterance, directly performs an action that inflicts serious harms. The practical

effect of such performative or situation-altering speech depends on its objective meaning in the relevant context, rather than on any private, subjective intent. The objective approach, therefore, best captures and responds to the fundamental nature of threatening speech.

c. The objective threat standard is also consistent with this Court's precedent. In *Watts v. United States*, 394 U.S. 705, 708 (1969), the Court examined not the speaker's subjective intent, but the objective meaning of his statements in their context. In *Virginia v. Black*, 538 U.S. 343 (2003), the key to the Court's reasoning was the belief that cross burning does not always have a threatening meaning, but rather may have a constitutionally protected meaning in some contexts. In both decisions, the Court's emphasis on the meaning of the expressive activity in the relevant context was consistent with the objective threat standard.

d. The ability of the States to effectively combat the harms caused by threats would be impaired if the subjective threat standard were constitutionally required. A narrow focus on a speaker's subjective intent unrealistically severs threatening speech from the context that gives it meaning and determines its harmful impact. In contrast, the objective approach realistically responds to the harms in question by focusing on the objective meaning of the speech as it would be understood by reasonable persons under all of the relevant circumstances.

The objective approach is especially valuable in the domestic abuse context. Social scientists today understand domestic abuse as patterned in nature and largely defined by non-physical manifestations of intimidation in which threats play a central role. Communications containing veiled threats that appear innocuous standing alone may reasonably have a threatening meaning when viewed in the context of an abusive relationship. The objective approach, therefore, is most consistent with practical realities and best ensures that offenders are held properly accountable for making threats.

ARGUMENT

I. Objectively threatening speech inflicts severe harms, which the States have a compelling interest in preventing.

Making people fear for their safety is a grave wrong that causes great personal and societal harm and serves no desirable purpose. Threats induce emotional and mental disturbance in the threatened person, disrupt and interfere with people's lives and legitimate activities, and divert personal and social resources to defensive efforts aimed at preventing the carrying out of the threats and responding to their effects. The government therefore has a compelling interest in regulating threats and an objective threat standard best promotes that interest.

Various federal and state statutes make the issuance of a threat a basis for civil or criminal

liability. For example, the statute at issue here makes it a crime, punishable by fine or imprisonment, to transmit in interstate commerce "any communication containing . . . any threat to injure the person of another." 18 U.S.C. § 875(c). Other federal statutes are more specific—prohibiting, for example, threats of force or violence against the president or vice president; judges and other federal officials; IRS employees; providers of reproductive health services; and jurors. *See* 18 U.S.C. §§ 871(a), 115(a)(1)(B), 248, and 1503 and 26 U.S.C. § 7212(a).

The State legislatures in all of the *amici* States have likewise enacted statutes to protect their residents against threats of violence and the serious harms caused by such threats. Such state laws prohibit or otherwise regulate threatening communications not only through general criminal restrictions on threats like 18 U.S.C. § 875(c), but also through statutes addressing specific areas of concern. These include statutes prohibiting threats to judges or other government officials or employees, statutes prohibiting all forms of extortion—including blackmail and intimidation of crime victims or witnesses in court proceedings, bomb threats and other terroristic threats—and disorderly conduct statutes that, among other things, prohibit violent or abusive speech under circumstances tending to cause or provoke a disturbance of public order.

Perhaps most significant of all are state criminal prohibitions on stalking and various forms of domestic abuse and intimidation, including related

statutes that provide for restraining orders and injunctions to protect victims of domestic abuse. Anti-stalking laws, typically prohibit a course of conduct that includes not only physical actions—such as maintaining visual or physical proximity to the victim, appearing at the victim's home or workplace, or monitoring the victim through photographic, video, audio, or other electronic means—but also conveying verbal or written threats directed at the victim. Domestic abuse laws, likewise, typically allow courts to enjoin not only violent physical conduct, but also threats to engage in such conduct.

Since the nation's first anti-stalking law was enacted in California in 1990, all 50 states and the District of Columbia have criminalized stalking, either by creating a specific anti-stalking law or by modifying existing harassment statutes to apply in stalking situations. *See* Patricia G. Tjaden, *Stalking Policies and Research in the United States: A Twenty Year Retrospective*, 15 Eur. J. Crim. Policy Res. 261, 262 (2009); Shannon Catalano, U.S. Dept. of Justice, Bureau of Justice Statistics, *Stalking Victims in the United States – Revised* 1 (2012); Adeola Olagunju and Christine Reynolds, *Domestic Violence*, XIII Geo. J. Gender & L. 203, 228 n. 196 (2012) (citing statutes).

All jurisdictions in the nation also allow victims of stalking and domestic abuse to petition a court for a civil protection order, and such orders are one of the most commonly used legal remedies for such conduct. *See* Margaret E. Johnson, *Redefining Harm,*

Reimagining Remedies, and Reclaiming Domestic Violence Law, 42 U. C. Davis L. Rev. 1107, 1131 n. 114 (2009) (citing statutes); Olagunju and Reynolds, *supra* at 241; Melvin Huang, *Keeping Stalkers at Bay in Texas*, 15 Tex. J. C.L. & C.R. 53, 68 (2009).

Congress has further addressed the problem of stalking in federal jurisdictions and stalking that crosses state lines in the Violence Against Women Act of 1994 and subsequent reauthorizations and the Interstate Stalking Punishment and Prevention Act of 1996. *See* Tjaden, *supra* at 268-69. At the direction of Congress, the National Institute of Justice developed a Model Stalking Code for States that has provided many jurisdictions with guidance in drafting or amending their own laws. *See id.* at 262; U.S. Dept. of Justice, National Institute of Justice, *Project to Develop a Model Anti-Stalking Code for States* (1993).

Stalking and domestic abuse cause such widespread harms that they are legitimately considered a serious criminal justice and public health problem. The 1998 National Violence Against Women Survey (NVAWS) found that approximately 8.2 million U.S. women and 2 million U.S. men had been stalked in their lifetimes, while 1 million women and 371,000 men are stalked annually. *See* Patricia Tjaden and Nancy Thoennes, U.S. Dept. of Justice, National Institute of Justice, *Stalking in America: Findings From the National Violence Against Women Survey* 3 (1998). More recent studies have shown even higher prevalence levels, with the Bureau of Justice Statistics estimating that more

than 3 million people are stalked annually in the U.S., and a national survey by the Centers for Disease Control and Prevention estimating that 1 in 6 women (16.2%) and 1 in 19 men (5.2%) in the U.S. have experienced stalking victimization at some point in their lives. *See* Catalano, *supra* at 1; Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 2 (2011) (hereinafter CDC (2011)); Tjaden, *supra* at 270-71; Huang, *supra* at 55.

In addition to being widespread, the harms caused by stalking and domestic abuse are also severe, not only in their association with physical violence, but also in the harm directly caused by fear itself and its disruptive effects. Threats against stalking victims and related persons are common, and many such threats are associated with actual stalker violence. *See* Michele Pathé and Paul E. Mullen, *The Impact of Stalkers on Their Victims*, 170 British J. of Psychiatry 12, 15 (1997). Research shows that threats of violence by abusers against their intimate partners are highly predictive of actual physical violence and are a better predictor of future violence than past violent behavior. *See* Joanne Belknap et al., *The Role of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Pol'y 373, 378 (2012); Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 Homicide Studies 300, 302 (1999). Studies have found that many women who are murdered by a current or former intimate partner

are first threatened and stalked by that partner. *See* Tjaden, *supra* at 272; McFarlane, *supra* at 312; Cindy Southworth et al., National Network to End Domestic Violence, *A High-Tech Twist on Abuse: Technology, Intimate Partner Stalking, and Advocacy* 3 (2005), at 3. All of this research strongly suggests that it is objectively reasonable for victims of stalking and domestic abuse to take their abusers' threats seriously.

Threats of violence by stalkers are very harmful, even apart from the violence that often follows them. "The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense." *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991); *see also Rogers v. United States*, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring) ("[T]hreats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out."). The mere utterance of a threat thus inflicts injury at the moment it is communicated to the target, without need for any further overt act or any specific subjective intent on the speaker's part. The threat itself and its disruptive effects will harm the target and the target's family for an indefinite period of time. *See* Robert Kurman Kelner, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 Va. L. Rev. 287, 291 (1998); Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 Stan. L. Rev. 1337, 1392 (2006).

The fears and emotional stress engendered by stalking and domestic abuse are many and varied. Nine percent of stalking victims report fear of death. Twenty-nine percent fear the stalking will never stop. More than half of the victims fear bodily harm to themselves, their child, or another family member. *See* Katrina Baum and Shannon Catalano, U.S. Dept. of Justice, Bureau of Justice Statistics, *Stalking Victimization in the United States* 6 (2009). Moreover, it is frequently difficult to determine whether the speaker will attempt to carry out a threat, and the resulting uncertainty can seriously affect the lives of targeted persons and their loved ones. *See* John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 Buff. L. Rev. 653, 663-64 (1994).

According to one report, the most common fear reported by stalking victims is not knowing what will happen next. As one victim described her ordeal:

> I wake up every morning, wondering if this is the day I will die at the hands of my stalker. I spend the day looking over my shoulder for him. I jump every time the phone rings. I can't sleep at night from worrying, and when I do sleep, I have nightmares of him. I can't escape him, not even for a minute. I never have a moment's peace, awake or asleep.

U.S. Dept. of Justice, Office of Community Oriented Policing Services, *Creating an Effective Stalking Protocol*, at 11 (2002).

Victims of domestic abuse often describe these psychological impacts as the most painful harms they suffer. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959, 968 (2004); Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 Wm. & Mary J. Women & L. 495, 509 (2008). Stalking victims almost always experience a "pervasive sense of loss of personal safety, a constant feeling of stress, and hypervigilance." U.S. Dept. of Justice, Office of Community Oriented Policing Services, *supra* at 11. Victims often complain about feeling exhausted and being unable to concentrate; some experience short-term memory problems, which decrease work productivity or academic performance. *Id.* The psychological harm to victims may be further exacerbated by concerns about the harmful effects stalking may have on the victim's children or other secondary victims. *Id.* at 12.

The threatening conduct of stalkers and domestic abusers also imposes a significant burden on the health care systems in the *amici* States. *Cf.* CDC (2011) at 1; Centers for Disease Control and Prevention, *Intimate Partner Violence in the United States—2010* 1, 65, 67 (2014) (hereinafter CDC (2014)). The severe stress caused by continuous fear adversely affects the functioning of many bodily systems and contributes to a wide range of acute and chronic physical and mental health conditions. *See* Karst, *supra* at 1342, 1344; CDC (2011) at 1; CDC

(2014) at 1; Pathé et al., *supra* at 14; Rachmilovitz, *supra* at 509-10; Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J. L. & Pub. Pol'y 283, 291 (2001) (citing *Tompkins v. Cyr*, 202 F.3d 770, 782 (5th Cir. 2000); *United States v. Alkhabaz*, 104 F.3d 1492, 1498 (6th Cir. 1997); *Simpson v. Burrows*, 90 F. Supp.2d 1108, 1121 (D. Or. 2000)). More health problems for victims means more visits to health care providers and more frequent and longer hospital stays. *See* CDC (2014) at 61.

The fear and disruption caused by threats also generate a variety of social and economic difficulties for victims, decreasing their productivity and burdening them with the costs of trying to protect themselves and their loved ones. More than 80% of stalking victims have reported curtailing social contacts and modifying their usual activities, sometimes radically, so as to reduce their sense of insecurity. *See* Pathé et al., *supra* at 14; Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 Cardozo L. Rev. 525, 530-31 (1993). A substantial majority of victims also report taking a variety of often burdensome and expensive security measures, such as obtaining unlisted telephone numbers and post office boxes; installing caller ID or call blocking; buying a new car; changing their surname; installing elaborate home security systems; or relocating to a new residence. *See* Pathé et al., *supra* at 14; Tjaden and Thoennes, *supra* at 2; Baum and Catalano, *supra* at 6-7.

Given the scope and severity of the harms described above, there can be no question that States have a compelling interest in prohibiting threatening communications so as to protect the safety of their citizens and allow them to live their lives with a basic sense of personal security.

II. The objective threat standard used by most lower courts is consistent with the First Amendment.

A. Threats of violence are not protected by the First Amendment.

Regulating verbal threats is regulating the content of expression and, therefore, implicates the Free Speech Clause of the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 403 (1992). That provision, however, does not protect all speech or guarantee an absolute freedom to say anything to anyone at any time. *See Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

As a general matter, the First Amendment prohibits government from imposing content-based restrictions on speech absent a compelling government interest that cannot be promoted through any less restrictive alternative. *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). This Court has repeatedly held, however, that content-based restrictions are permissible for certain narrowly-defined categories of speech that directly harm society while contributing little or nothing to the exposition of ideas:

> Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

R.A.V., 505 U.S. at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (citations omitted).

These categories of speech—such as obscenity, child pornography, fighting words, and false advertising—are considered by the Court to lie outside the scope of First Amendment protection because "within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *New York v. Ferber*, 458 U.S. 747, 763-64 (1982) (child pornography); *see also Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (fighting words); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (false advertising). This "categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate . . . only upon a showing of compelling need." *R.A.V.*, 505 U.S. at 400 (White, J., concurring).

This Court has repeatedly recognized that threats of violence are one such category of unprotected expression. *See R.A.V.*, 505 U.S. at 388 ("[T]hreats of violence are outside the First Amendment."); *United States v. Watts*, 394 U.S. 705, 708 (recognizing that a true threat to personal safety enjoys no constitutional protection). The Court has identified three governmental interests that justify the exclusion of threats of violence from First Amendment protection: (1) the interest in "protecting individuals from the fear of violence," (2) the interest in protecting them against "the disruption that [such] fear engenders," and (3) the interest in protecting them "from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

B. The objective threat standard best promotes the purposes of allowing government to regulate threats

This Court has not, however, attempted to articulate a rigid, doctrinal definition that would precisely delimit the outer reaches of the category of unprotected threats.

For decades, most lower courts—including the lower courts in the present case—have applied an objective, reasonable person standard for determining whether a particular communication is an unprotected threat. Such an objective standard asks whether a reasonable person would foresee that the communication in question would be understood by those to whom it is directed as a serious expression of an intention to inflict injury on another

person. *See, e.g., United States v. Whiffen*, 121 F.3d 18, 20 (1st Cir. 1997); *United States v. Myers*, 104 F.3d 76, 81 (5th Cir.), *cert. denied*, 520 U.S. 1218 (1997); *United States v. Himelwright*, 42 F.3d 777, 783 (3d Cir. 1994); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), *cert. denied*, 514 U.S. 1097 (1995); *United States v. Malik*, 16 F.3d 45, 48 (2d Cir. 1994); *United States v. DeAndino*, 958 F.2d 146, 148-49 (6th Cir.), *cert. denied*, 505 U.S. 1206 (1992); *United States v. Schneider*, 910 F.2d 1569 (7th Cir. 1990).

Under this objective approach, the threatening nature of a communication is not determined by "probing [the speaker's] subjective purpose," but instead is "determined objectively from all the surrounding facts and circumstances." *DeAndino*, 958 F.2d at 148. The speaker need not have subjectively intended that any recipients understand the communication as threatening, as long as a reasonable person familiar with all of the relevant context of the communication would understand it as a threat. *See Darby*, 37 F.3d at 1066.

The objective threat standard best promotes the purposes of allowing government to prohibit or restrict threatening communications. To illustrate why this is true, it is helpful to closely examine the particular characteristics of fighting words and threats that place them outside the scope of the First Amendment.

In establishing fighting words as an unprotected category, this Court characterized them as words "*which by their very utterance inflict injury* or tend to

incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572. The Court went on to observe that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* Fighting words are unprotected by the First Amendment, not because of the ideas (if any) that they may communicate, but because "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 505 U.S. at 393. That is, "despite their verbal character," fighting words are "analogous to a noisy sound truck" and are excluded from the scope of the First Amendment due to their "'nonspeech' element of communication." *Id.* at 386.

Threats are similar to fighting words in this regard because, by their very utterance, they immediately and directly inflict the fear of personal injury on the target of the threat and disrupt the target's life and activities with the serious consequences of such fear. Threats are largely devoid of First Amendment value in that they typically have little or no political, ideological, or other normative content and do not purport to inform citizens in their decision making, to advance a search for truth, or to aim at a larger social or public good. *See* Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 213-14; Karst, *supra* at 1390. Threatening speech is outside the protection of the First Amendment because, by

its very utterance, it immediately and directly inflicts serious harms that far outweigh any minimal expressive interests it might advance. *See* John Rothchild, *Menacing Speech and the First Amendment*, 8 Tex. J. Women & L. 207, 215-16 (1999).

More generally, verbal utterances may not only declare some fact or describe some state of affairs, but may also directly perform some action. J. L. Austin, *How To Do Things With Words* 1 (2d ed. 1975). Even utterances that look like expressive or descriptive statements may not actually record, describe, or report information, but rather may directly affect the world in different ways. The utterance is itself the performance of an action that cannot accurately be described as simply saying something. *Id.* at 2, 5. The marital declaration "I do" is a familiar example of this. *Id.* at 5. Such an utterance—sometimes called "performative"—is not a description of the speaker's action or a statement that the speaker is doing it, but rather is itself the performance of the action by the speaker. *Id.* at 6.

In the First Amendment context, these performative speech acts are often referred to as "situation altering" utterances. *See, e.g.*, Kent Greenawalt, *Speech and Crime*, 1980 Am. B. Found. Res. J. 645, 680, 741-42; Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 Nw. U. L. Rev. 1081, 1091-95 (1983). The dominant import of these communications lies in directly and immediately altering a situation or inducing an action, not in conveying ideas about facts or value. *Id.*

The reasons for the constitutional protection of free speech apply much more forcefully to statements of fact and value than they do to situation-altering statements because the former may advance individual autonomy and foster creativity and dynamism in the marketplace of ideas, while the latter are largely lacking in substantive content and operate more like a physical action than like a verbal or symbolic communication of ideas or emotions. *Id.*; *Cf. R.A.V.*, 505 U.S. at 386. Moreover, the actions performed by situation-altering communications can be directly and immediately harmful, for in addition to the countless positive and beneficial things that can be done with words, they also can deceive, defraud, misrepresent, defame, discriminate, harass, intimidate, and threaten. *See* O. Lee Reed, *The State Is Strong But I am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals With Violence*, 38 Am. Bus. L. J. 177, 177-78 (2000).

For present purposes, the key point is that the practical effect of situation-altering speech depends on its meaning in the relevant context, rather than on any private, subjective intent of the speaker. *See* Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. U. L. Rev. 45, 84 (2011); Austin, *supra* at 9, 13.

All uses of language appeal to known public meanings as informed by contextual framing. Meaning is a function of publicly shared context and usage conventions, not of private facts concerning

the speaker's mental state. *See* Mason, *supra* at 93; Austin, *supra* at 9, 13. It follows that a speaker who makes an utterance with a particular objective meaning within a given linguistic community cannot simultaneously claim that he actually subjectively intended a different meaning. "[W]hat we can mean is at least sometimes a function of what we are saying. Meaning is more than a matter of intention, it is also at least sometimes a matter of convention." Mason, *supra* at 89 (quoting John Searle, *Speech Acts: An Essay in the Philosophy of Language* 45 (1969)).

This is especially true of performative speech acts. The practical effect of a performative utterance depends on a variety of factors, including the grammar and syntax employed, the relationship between speaker and audience, and the historical and contextual background of the utterance. *See id.* at 84 (citing John R. Searle and Daniel Vanderveken, *Foundations of Illocutionary Logic* 27 (1985)); Austin, *supra* at 142. The speaker's subjective intent about how the audience will or should interpret the utterance may be one factor in determining its practical effect—at least to the extent subjective intent is known or knowable to other members of the relevant community—but it is not dispositive. *See* Mason, *supra* at 84 (citing Searle and Vanderveken, *supra* at 27). The practical effect of performative speech is neither reducible to nor determined by the speaker's intention. *See id.* at 84-85.

This is fundamental to the law of contracts. When a speaker utters certain words in certain

circumstances, he thereby forms a contract—which is a type of performative utterance. If he does not subjectively intend to bind himself by that utterance, the contract may have been made in bad faith, but it is nevertheless a contract—as long as it was made in appropriate circumstances and in accordance with the applicable conventions. Austin, *supra* at 9-11. Accordingly, in contract law, courts will hold the parties to the intentions objectively manifested by the public meaning of the language used and will not give legal effect to private meanings favored by one party but not conveyed to the other. *See* Restatement (Second) of Contracts § 212 cmt. a (1981). "[T]he relevant intention of a party is that *manifested by him* rather than any different *undisclosed* intention." *Id.* (emphasis added).

This reasoning applies with particular force to the law of threats. Statutes that prohibit or restrict threatening communications are directed at protecting against the harms of fear and disruption caused by those communications. *See* Mason, *supra* at 98. Those harms flow from the utterance and the public meaning of the threat itself and do not depend on the subjective intent of the speaker. *See id.* at 48, 98.

In a threat case, the central question is, what is the objective, public meaning of the allegedly threatening communication? The answer requires an examination of the communication in the context of all the relevant background facts and the rules and conventions of the pertinent community. *See id.* at 90. Relevant contextual factors might include the identities of parties to the communication, their past

and present relationships, the relationships between groups to which the parties belong, the historical setting in which the communication occurs, the place where the communication is made, and the method or mode of communication. *See* Nockleby, *supra* at 659-60, 672.

This effort to determine the objective meaning of an allegedly threatening communication in light of all the surrounding facts and circumstances is precisely what is done by the majority of lower courts that have long applied the objective, reasonable person standard for determining whether a communication is an unprotected threat. That objective standard, therefore, properly responds to the fundamental nature of threatening speech and best promotes the government's legitimate and compelling interests in prohibiting threats.

C. The objective threat standard is consistent with this Court's precedent.

It is true, of course, that courts must "confine the perimeters of any unprotected category [of speech] within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of the U.S.*, 466 U.S. 485, 505 (1984). Accordingly, in *Watts*, this Court made it clear that statutes that criminalize threatening speech "must be interpreted with the commands of the First Amendment clearly in mind" and that courts must take care to distinguish between punishable threats and constitutionally protected speech. *Watts*, 394 U.S. at 707. The analysis in *Watts*, however, is consistent

with the objective threat standard adopted by most lower courts.

Watts involved a statement made by an 18-year-old man at an anti-war political rally held on the grounds of the Washington Monument. *Id.* at 705-06. In the course of a discussion at the rally, the young man reportedly stated that, if he was drafted and made to carry a rifle, the first man he would want to get in his sights would be the President. *Id.* at 706. On the basis of that statement, the young man was convicted of knowingly and willfully threatening the President, in violation of federal law. *Id.* This Court reversed the conviction, concluding that the defendant's facially threatening statement did not amount to a genuine or "true" threat because, when interpreted in the context in which it was made, the statement clearly was political hyperbole that was expressly conditional, was spoken in jest, and was not taken seriously by other attendees at the rally, who responded to the statement with laughter. *Id.* at 706-08.

In concluding that Watts' facially threatening speech was not a true threat, the Court did not inquire into the subjective contents of his mind, but instead examined the objective meaning of his statements in their public context. Factors that the court found relevant included the factual circumstances of the rally, its political dimension, the fact that the facially threatening statement was expressly conditional on an intervening event that Watts himself indicated was unlikely to occur (*i.e.* his induction into the U.S. military), and the light-hearted reaction of other listeners. *Id.*

Interpreted against that background, the decision was clear that Watts' facially threatening statement could not reasonably be understood as a serious expression of an intent to harm the President, but rather was potent political rhetoric used in the highly charged context of an anti-war rally. In concluding that Watts' statement was not truly a threat at all, but rather was political speech entitled to full First Amendment protection, this Court employed an analysis similar to and consistent with the objective threat standard accepted by most lower courts.

The Court's most recent discussion of true threats in *Virginia v. Black*, 538 U.S. 343 (2003), is also consistent with the objective threat standard. In *Black*, the court upheld the facial validity of Virginia's statutory prohibition on cross-burning with the intent to intimidate, but invalidated the portion of the statute that allowed a jury to presume an intent to intimidate from the mere fact of burning a cross in public. In upholding the statute's core prohibition, the Court reasoned that cross-burning with the intent to intimidate was simply a particularly virulent form of intimidation, which is a category of expression that is not protected by the First Amendment. *Id.* at 363. The statutory presumption, in contrast, violated the First Amendment because it allowed the statute to effectively prohibit *all* public cross-burning, even though, a majority of the Court found, cross-burning in some contexts has a political meaning, rather than an intimidating or threatening meaning, and therefore is entitled to First Amendment protection in those contexts. *Id.* at 365-66; *see also id.* at

385-86 (Souter, J., concurring in part and dissenting in part).

The petitioner in the present case contends that *Black* abrogated the objective threat standard and instead adopted a subjective standard under which threatening speech can be prohibited only if there is proof that the speaker subjectively intended the speech to be understood as a threat. Petitioner bases that contention on two statements in *Black*. The first is the statement that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359. The second is the statement that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

Petitioner's claim that *Black* abrogated the objective standard for true threats and substituted a subjective intent requirement is unpersuasive, for two reasons.

First, the plain language of the two statements in *Black* relied on by petitioner did not purport to delineate the border between true threats and protected speech.

The first of those statements merely said that true threats "encompass" statements in which a speaker purposefully communicates "an intent to

commit an act of unlawful violence." *Id.* at 359. The word "encompass" is not a term of definition or identity, but rather implies two distinct categories: a larger, encompassing category and a smaller, encompassed category. Many courts, including this Court, regularly use "encompass" in this way in cases in which the courts refrain from exhaustively defining a term, while holding that the term encompasses some other term. *See* Mason, *supra* at 53-54 (citing cases).

The *Black* Court's conclusion that the larger category of true threats includes the smaller category of statements made with the subjective intent to threaten does not mean that all true threats must be made with that subjective intent. One could just as well argue that, because the category of fruits encompasses the category of apples, all fruits are apples.

The second statement relied on by petitioner eliminates any possible doubt about this point by explicitly saying that intentional intimidation "is a type of true threat." *Id.* at 360. A statement about a *type* of true threat does not give an exhaustive definition of a true threat.

Second, *Black* did not address the constitutionality of the objective standard at all because the Virginia statute did not employ an objective standard, but rather required subjective intent to intimidate as a *statutory* element. *See id.* at 348. The analysis in *Black* is phrased in terms of subjective intent to intimidate because such intent was an element of the statute the Court was

interpreting. The *Black* Court had no occasion to address whether an objective, reasonable-person standard is constitutionally permissible.

The key to the Court's reasoning, however, was the belief of a majority of the Court that cross-burning does not always have a constitutionally unprotected threatening meaning, but rather, in some political contexts, has a constitutionally protected meaning as a statement of ideology or group unity. *Id.* at 365-66. The problem with the Virginia statute's presumption was that it ignored all the contextual factors that are necessary to distinguish between those two different meanings. *See id.* at 367. In this emphasis on the meaning of the expressive activity in light of relevant contextual factors, *Black* is quite consistent with the traditional, objective threat standard.

D. An objective threat standard is consistent with the realities of threats of violence and ensures that offenders are held accountable for their threats.

The ability of the *amici* States to effectively combat the widespread and severe harms caused by threats of violence would be significantly impaired if this Court were to adopt the subjective threat standard advocated by the petitioner in this case.

Under a subjective standard, courts would be required to protect threatening speech based on what can or cannot be proved about the private, interior meaning attributed to the speech by the speaker, even if the context in which the speech is

uttered is such that any reasonable person would understand it to have an objectively threatening meaning. The harm caused by a threat is not a function of any unexpressed, subjective purpose of the speaker, but rather results directly from the impact of the threat as it is understood by its recipients. A narrow focus on a speaker's subjective intent unrealistically decontextualizes threatening communications from the background that gives them meaning and that determines their harmful impact.

In contrast, the objective threat standard properly promotes the States' interest in combating the harms caused by threats by realistically focusing on the objective meaning of the threatening speech as it would be understood by reasonable persons under all of the relevant circumstances.

The adoption of a subjective threat standard as a First Amendment requirement would be especially damaging to the *amici* States' efforts to combat the widespread and severe harms of stalking and domestic abuse. In the context of a relationship between current or former intimate partners, it is especially easy for communications with an objectively threatening meaning to be made in subtle, implied, and deliberately veiled forms for which it could be difficult or impossible to prove subjective intent as to individual utterances, but which nonetheless have devastating negative effects on victims.

There has been a growing emphasis in social science scholarship on understanding domestic

abuse as involving not only specific incidents of violence, but as patterned in nature and largely defined by non-physical manifestations of dominance and coercive control that extend to all aspects of the relationship and of the victim's living situation. *See* Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 Hofstra L. Rev. 1295, 1317, 1319 (1993); Tuerkheimer, *supra* at 961-62; Cynthia Southworth et al., *Intimate Partner Violence, Technology, and Stalking*, 13 Violence Against Women 842, 843 (2007) (hereinafter Southworth (2007)); Joan Erskine, *If It Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 Brook. L. Rev. 1207, 1229 (1999).

Domestic abusers use fear, emotional abuse, and social isolation to construct an elaborate system of domination and subordination. *See* Tuerkheimer, *supra* at 985-86. The abusive relationship is a dynamic pattern of intimidation, power, and control that goes beyond discrete abusive incidents. *See* Erskine, *supra* at 1209. A focus on isolated events thus fails to grasp the impact of those events on the victim in the overall context of abuse. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1208 (1993).

The use of threats by abusers to psychologically coerce and control their victims is central to the patterns of coercive control that typify domestic abuse relationships. *See id.* at 1206; Belknap, *supra*

at 377-78; Southworth (2007) at 843. The harmful impact of these threats—like that of other abusive acts—is determined by the overall context of the abusive relationship.

Perpetrators of domestic abuse often are highly manipulative and typically have a large amount of personal information about their victims that can be used to threaten in subtle and devious ways. *See* Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 Fam. L. Q. 353, 359 (2008); Belknap, *supra* at 379. Most intimate partner stalking occurs in a relationship that has a history of violence and abuse and the victim, therefore, is often already afraid of the abuser and knows that the threats are not idle. *See id.* It is thus easy for abusers to instill fear in victims through seemingly innocuous messages containing implied or veiled threats. *See id.* at 387-88. In such contexts of prior violence and victimization, behavior which might not appear threatening in other circumstances may reasonably be considered a clear sign of danger. *See* Dutton, *supra* at 1194-95; Bernstein, *supra* at 559. Requiring proof of a subjective intent to threaten in every such case would effectively immunize from liability those individuals clever enough to word their threats in a manner that allows them to subsequently deny any subjective intent to threaten. *See Whiffen*, 121 F.3d at 21; *Malik*, 16 F.3d at 50.

The systemic and patterned nature of domestic abuse makes clear the importance of contextual factors in understanding the impact of threatening

conduct on victims. *See* Dutton, *supra* at 1202. Because stalking and domestic abuse are characterized by ongoing courses of conduct, the history and context of the abusive relationship is probative of the objective meaning of particular threatening statements. *See* Tuerkheimer, *supra* at 997. A view of the entire context that connects and organizes individual acts is, therefore, essential to grasping the full measure of the harm inflicted by the abuser and suffered by the victim. *See id.* at 973-74.

This is not to say that the objective threat standard would enable government to criminalize threatening speech based on a private meaning that might be attributed to it by a particularly vulnerable or sensitive recipient. On the contrary, the objective standard requires the trier of fact to interpret an allegedly threatening statement in the light of the totality of the relevant contextual circumstances and from the perspective of a reasonable listener familiar with that context. *See United States v. Darby*, 37 F.3d at 1066. This test thus "avoids the risk that an otherwise innocuous statement might become a threat if directed at an unusually sensitive listener." *Whiffen*, 121 F.3d at 21. At the same time, the objective approach "also protects listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten, or, as would be more common, the government is unable to prove such specific intent which, by its nature, is difficult to demonstrate." *Id.* The objective standard thus gives

proper weight to protecting the victims of threats, while not criminalizing innocent statements.

For all of these reasons, the *amici* States are justified in prohibiting or restricting any communications that convey an objectively threatening meaning that causes others to reasonably feel that their safety is seriously threatened. Continued use of the objective threat standard should be allowed, to ensure that unreasonable offenders can be held accountable for causing reasonable listeners to live in fear.

CONCLUSION

The judgment of the Third Circuit Court of Appeals should be affirmed.

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Respectfully submitted,

J.B. VAN HOLLEN
Wisconsin Attorney General

THOMAS C. BELLAVIA*
Assistant Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690 / (608) 267-2223 (Fax)
bellaviatc@doj.state.wi.us
**Counsel of Record*